80-1923

No.

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TOMMIE L. FULKS,
Petitioner,

versus

AVONDALE SHIPYARDS, INC.,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Only two questions for review are presented. These are: (1) whether the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, et seq., as amended in 1972, gives a tilt of the scale in favor of an injured workman if medical testimony for him and for the employer are diametrically opposed and that the medical experts are of equal competence; and, (2) whether an injured workman is totally disabled if he has two large holes in his lungs and an expert in area personnel management testifies that he could not get work with any insured area employer.

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OPINIONS OF LOWER COURTS AND TRIBUNALS

1. Opinion of the Administrative Law Judge, dated September 19, 1975, entitled: In the Matter of TOMMIE L. FULKS, Claimant v. AVONDALE SHIPYARDS, INC., Employer, SELF-INSURED, Case No. 75-LHCA-190, OWCP No. 7-19281. (Appendix A)

2. Decision of the Benefits Review Board, dated April 16, 1976, entitled: TOMMIE L. FULKS, Claimant-Petitioner v. AVONDALE SHIPYARDS, INC., Employer-Respondent; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Party in Interest, Benefits Review Board No. 75-269. (Appendix B)

3. Opinion of the United States Court of Appeals for the Fifth Circuit, dated October 15, 1976, entitled: TOMMIE L. FULKS, Petitioner-Cross Respondent v. AVONDALE SHIPYARDS, INC., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents-Cross Petitioners, No. 76-2578, Ordered Not to be Published. (Appendix C)

4. Decision On Remand of Benefits Review Board, dated January 4, 1977, entitled: TOMMIE L.

FULKS, Claimant-Petitioner v. AVONDALE SHIPYARDS, INC., Employer-Respondent; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Party-in-Interest. Benefits Review Board No. 75-269. (Appendix D)

5. Decision and Order of the Administrative Law Judge, dated April 6, 1978, entitled: In the Matter of TOMMIE L. FULKS, Claimant-Petitioner v. AVONDALE SHIPYARDS, INC., Employer-Respondent, Case No. 75-LHCA-190; OWCP No. 7-19281. (Appendix E)

6. Decision of Benefits Review Board, dated March 30, 1978, entitled: TOMMIE L. FULKS, Claimant-Petitioner, Cross-Respondent v. AVONDALE SHIPYARDS, INC., Self-Insured Employer-Respondent; Cross-Petitioner, Benefits Review Board No. 78-369A & 78-369B. (Appendix F)

7. Opinion of the United States Court of Appeals for the Fifth Circuit, dated February 23, 1981, entitled: TOMMIE L. FULKS, Petitioner-Cross Respondent v. AVONDALE SHIPYARDS, INC., Respondent-Cross Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondent. No. 79-1861. (Appendix G)

JURISDICTIONAL GROUNDS

The jurisdiction of this court is invoked pursuant to 28 U.S.C., Section 1254. Petitioner seeks a review of the decision of the Fifth Circuit Court of Appeals, dated and entered February 23, 1981. In that decision the Fifth Circuit decided that the aggravation of Fulks' lung condition and compensation therefor would be affirmed, but that his original lung disease did not arise from his employment. It further affirmed the trial judge's opinion that Fulks was not totally disabled.

STATUTES INVOLVED

The statute involved is the Longshoremen and Harbor Workers' Compensation Act. 33 U.S. Code 901 and following have been construed with a view to the beneficent purposes of the act and all doubts, including those purely factual, have been resolved in favor of the employee.

STATEMENT OF THE CASE

Shipyard welder Fulks fell ill in 1966 with a lung condition. He was initially diagnosed as having pulmonary tuberculosis. His family physician, deceased at the time of trial, sent him to the Veterans Administration Hospital, New Orleans. He was treated and finally diagnosed as having "Atypical Battey Bacillus" infection of both lungs. After treatment in 1966 and 1967 he went

back to welding at Avondale. After a few weeks he had a relapse.

He returned to Avondale again in 1968 only to suffer another relapse.

After treatment he came back and applied for work again in 1971, but was refused by Avondale. His present claim followed.

A Writ of Certiorari should be granted for the reason that the decision of the Fifth Circuit Court of Appeals is contrary to the intent of Congress and the decisions of the United States Supreme Court directing that doubts be resolved in favor of the injured workman. *General Acc. Fire & Life Assur. Corp. v. Donovan,* 251 F.2d 915, recons. den. 251 F.2d 961 (C.A. 1958); *Hartford Acc. & Indem. Co. v. Cardillo,* 112 F.2d 11, cert. den. 60 S.Ct. 1100 (1940); *Travelers Ins. Co. v. Parker,* 40 F.Supp. 692 (1941); *Perini Corp. v. Heyde,* 306 F.Supp. 1321 (D.C. R.I. 1969); *Steele v. Adler,* 269 F.Supp. 376 (D.C. 1967).

ARGUMENT

From inception, the LHWCA has tilted the scale in favor of the injured workman when evidence was diametrically opposed. *Friend v. Britton,* 220 F.2d 820, 95 U.S.App.D.C. 139, cert. den. 76 S.Ct. 72, 350 U.S. 836, 100 L.Ed.745 (1955); *Vinson v. Einbinder,* 307 F.2d 387, 113 U.S.App.D.C. 246, cert. den. 83 S.Ct. 880, 372 U.S. 934, 9 L.Ed.2d 765 (1962).

In this case the medical argument resolved itself into a diametrically opposed view of two physicians who said that the Battey infection came from Fulks' work and on the defense side two equally highly qualified experts said that it did not. Dr. Hans Weill of Tulane Medical School saw Fulks four times. Once he qualified him as totally disabled for Social Security purposes. Once he saw him for a life insurance company. Dr. Shames of the Tulane faculty never saw Fulks. He agreed with Dr. Weill that Fulks' Battey bacillus illness did not come from his work.

Dr. Buechner, professor of medicine at both Tulane and LSU medical schools, said that Fulks did become a victim of Battey bacillus disease of the lungs due to his work. Dr. Brown, treating physician for Fulks during more than nine years at the V.A. Hospital, testified that the Battey bacillus infection came from the shipyard welding.

The Administrative Law Judge found that Fulks' condition was aggravated only from his return to work at Avondale. This is the basis of the decree for Fulks.

It is submitted that the doctrine which gives the claimant the benefit of doubt in medical and other disagreements directs that it should have been found that Fulks became ill as a result of his work environment. For this reason the Fifth Circuit Court of Appeals decision should be carefully reviewed.

Additionally, the same type of disagreement existed in setting out the amount of disability Fulks has. Social Security found him totally disabled basing the finding on a report from Dr. Weill, the defense physician in the trials. Louisiana Employment Security workers said he could find a job as a janitor, even considering that his physicians did not want him to work about dust.

Wm. V. Dunne, a personnel director in the New Orleans area for many years, said he could not find a job in an insured firm.

CONCLUSION

It is respectfully requested that the Court grant a Writ of Certiorari and review the decision of the Fifth Circuit Court of Appeals, which affirmed the Administrative Law Judge's finding that Fulks' illness was aggravated, but not caused, by his shipyard work; and that Fulks is less than totally disabled.

Respectfully submitted,

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CERTIFICATE

The undersigned counsel of record certifies that service has been effected by placing three copies of the foregoing petition in the U.S. Mail, postage prepaid on all parties required to be served listed below on the ____ day of May, 1981.

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APPENDIX A

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges

In the Matter of:
TOMMIE L. FULKS,
Claimant,

versus No. 75-LHCA-190
OWCP No. 7-19281
AVONDALE SHIPYARDS, INC.,
Employer.

SELF-INSURED

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Before: ROBERT J. FELDMAN
Administrative Law Judge

DECISION AND ORDER

Claimant seeks compensation for disability pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (hereafter referred to as "the Act").

Statement of the Case

Claimant worked for the Employer as a welder for some fifteen years. During this period he contracted a pulmonary disease which in 1966 was diagnosed as tuberculosis and was treated as such. After discharge from the Veterans Administration Hospital in 1967, he returned to work, but after a few weeks of regular welding, he suffered a relapse and resumed treatment as an outpatient until March of 1968, when he again returned to work. In August of 1968, he suffered another relapse and was re-admitted to the hospital. He has not worked since. The gravamen of his claim is that his lung condition arose from dust, sand, gases and fumes encountered at work, and that his 1967 and 1968 relapses were precipitated by the same causes.

A preliminary issue is raised as to whether the claims should be barred because of Claimant's failure (a) to file the claim within one year from the date of injury; or (b) to give the Employer written notice within 30 days of injury. On behalf of the Director, Office of Workers' Compensation Programs, the Solicitor of Labor has

submitted a post-hearing brief in opposition to barring the claim on either of such grounds.

The substantive issues presented are as follows:

1. Does jurisdiction lie under applicable provisions of the Act?

2. Did Claimant's lung condition arise out of his employment?

3. Has Claimant's lung condition resulted in economic disability?

Timely Claim and Notice

Section 13 of the Act provides that a claim shall be barred unless filed within one year after the injury. Long before its amendment in 1972, by which the running of the time was expressly conditioned upon the employee's awareness of the relationship between injury and employment, the Courts had held that in occupational disease cases the one-year period did not commence until the employee knew or should have known that his injury or illness was job-related. *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137 (2nd Cir. 1955), cert. denied, *sub nom. Ira S. Bushey & Sons* v. *Cardillo*, 350 U.S. 913 (1955); *Aerojet-General Shipyards, Inc.* v. *O'Keefe*, 413 F.2d 793 (5th Cir. 1969); *Smith* v. *Atlantic Sandblasting Service, Inc.*, 1 BRBS 97 (1979).

Section 12 of the Act requires that written notice be given to the employer within 30 days after the injury. This section was also amended in 1972 to provide expressly for such notice within 30 days after the employee is aware or should have been aware of the relationship between the injury and the employment. Like Section 13, it had been held prior to the amendment that the 30-day notice need not be given until the employee knew or should have known that his injury arose out of his employment. *Bethlehem Steel Co.* v. *Parker*, 72 F.Supp. 35 (D. Md. 1974), aff'd. 163 F.2d 334. Moreover, subdivision d of Section 12 provides that no claim shall be barred for failure to give notice if the employer had knowledge of the injury, and if it is determined that the employer or carrier has not been prejudiced by failure to give such notice.

It is clear from the evidence that Claimant had no reason to believe that his tubercular condition was causally related to his job until 1971, when he was informed of that possibility by Dr. Brown. It is also clear that the Employer had knowledge of Claimant's illness in 1966 and his relapses in 1967 and 1968. In fact, the Employer declined to re-employ Claimant in 1971 because of his poor health. The Employer thus had sufficient knowledge of Claimant's injury. See *Butler* v. *District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Leyden* v. *Capitol Reclamation Corp.*, 2 BRBS 24 (1975). That the Employer has not been prejudiced by failure to give earlier notice is apparent from the fact that it was able to obtain the testimony of three super-

visory employees on the situs and conditions of Claimant's employment during the years prior to 1966, as well as during the periods he worked in 1967 and 1968; to say nothing of its obtaining the expert testimony of Dr. Weill, who had examined Claimant in 1969, 1970, 1971, and 1975.

In short, it has not been shown that the claim should be barred under Section 12 or 13 of the Act.

Jurisdiction

In considering the question of jurisdiction or coverage under the Act, it should be borne in mind that Claimant's injury or illness occurred no later than the year 1968, when he last worked for the Employer. The 1972 amendments to Sections 2 and 3 extending the coverage of the Act were not merely remedial in character, but created new substantive rights. Therefore, the amendments may be applied prospectively only, and a claim such as this one, arising from an injury or illness occurring prior to the amendment, and filed prior thereto, is governed by the law as it existed before 1972.

Although Claimant testified that he had worked aboard ship for a short time during the year 1967, I am satisfied from all the evidence that during the years prior to 1966, when he first fell ill with his tubercular condition, and during most of his periods of work in 1967 and 1968, Claimant's employment was almost ex-

clusively ashore. The welding he performed was virtually confined to steel plates or components in process of fabrication prior to the launching of the vessel of which they were to become an integral part.

Prior to the 1972 amendments, injury in the course of new ship construction was held to be within admiralty and maritime jurisdiction only when the injury occurred while the new vessel was afloat on navigable waters. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196, (1962); *O'Leary* v. *Puget Sound Bridge and Dry Dock Co.*, 349 F.2d 571 (9th Cir. 1965). See also *Travelers Insurance Co.* v. *Shea*, 382 F.2d 344 (5th Cir. 1967). Consequently, it appears that this claim did not come within the coverage of the Act as it existed in 1968 and prior thereto.

Causal Relationship

Upon admission to the Veterans Administration Hospital in September 1966, Claimant's condition was diagnosed as bilateral pulmonary tuberculosis. Upon his discharge in February, 1967, and thereafter through November, 1971, Claimant's condition was diagnosed by Dr. Brown and other physicians at the Veterans Administration Hospital as atypical pulmonary tuberculosis due to Group III Battey type bacillus. In January of 1973, however, Dr. Brown prepared a special report in which he reviewed the Claimant's history and altered his diagnosis. He noted that in addition to iron from welding, the patient had been ex-

posed to quite a bit of sandblasting in the immediate area, which he found would be compatible with x-ray findings of fine interstitial fibrosis, and expressed the opinion that the patient actually has three diseases: (1) hemosiderosis (fine particles of iron deposits in the lung); (2) silicosis (a lung disease due to inhalation of fine particles of sand); and (3) silico-mycobacteriosis due to Group III type organisms (apparently intended to indicate a mixed dust disease or atypical mycobacterial infection associated with inhalation of silica). Dr. Brown reiterated that view at the hearing and testified that in his opinion Claimant's atypical mycobacterial disease is causally related to his exposure to sandblasting during the course of his employment.

In November, 1971, Dr. Weill re-examined Claimant at the request of Employer's former insurer and noted *inter alia* in his report: that in addition to exposure to welding fumes, sandblasting was frequently done in the patient's area; that among other changes appearing on the chest x-ray film, there is a fine linear and nodular infiltrative change within both lower lobes which has the appearance of diffuse interstitial reaction, possibly siderosis associated with welding or minimal silica deposition from the exposure to sand, but that such changes within the lower lobes are not likely to be functionally significant; that the fine infiltrative changes within both lower lobes may be related to iron or silica inhalation, although this association cannot be conclusively established; and that this change is minimal in extent and not likely to be a limiting factor. At

the hearing, Dr. Weill testified that on the basis of Claimant's history and his examinations of Claimant, including x-ray films and pulmonary function tests in 1969, 1970, 1971 and 1975, he was reasonably certain that Claimant did not have silicosis; that Claimant had no functional impairment associated with siderosis, if in fact siderosis were present; that the etiology of Claimant's atypical tuberculosis is the Battey bacillus, which is not transmissible from human to human, but comes from the soil, and is not classified as an occupational disease. Dr. Weill concluded that Claimant's mycobacterial infection was not causally related to his employment.

I am persuaded that Dr. Weill's views should prevail. I find them authoritative and well-reasoned. X-ray films are subject to varying interpretations and, in this instance at least, may not be relied on to furnish conclusive proof of the existence or nonexistence of specific disease. The evidence as to pulmonary function, however, appears to be definitive. Silicosis is a progressive disease and the observed improvement in Claimant's pulmonary function, contrary to the normal course of silicosis, lends strong support to the view that the atypical tuberculosis seen here was not due to inhalation of sand particles. In addition, the evidence as to the volume and proximity of the spot sandblasting to which Claimant was exposed raises considerable doubt as to the validity of the assumption that inhalation of silica was a causative factor in Claimant's mycobacterial infection.

Disability

There is no doubt that Claimant's pulmonary disease has resulted in permanent physical impairment. Yet there is little evidence of economic disability. True, Claimant is unable to resume his former duties as a welder and is unfit to perform heavy manual labor or to do work requiring more than ordinary physical exertion. To that extent, his job opportunities have been somewhat limited, but he is far from unemployable.

By the testimony of two qualified persons (a vocational rehabilitation counselor of the State Department of Education and a supervisor of the placement unit in the industrial division of the State Employment Service in New Orleans), the Employer has sustained its burden of showing not only that a person of Claimant's age, education, training, industrial experience and physical condition is, or can readily become, qualified to fill numerous jobs, but also that such jobs are currently available in the labor market in the area of Claimant's residence. Cf. *Perini Corporation* v. *Heyde*, 306 F.Supp. 1321 (D. R.I. 1969).

The jobs referred to would involve no appreciable loss of earnings. After a period of service as a trainee for perhaps a year (during which prevailing wages would be from $2 to $2.50 per hour), employment as a locksmith, meter repairman, watch repairman or the like would be paid at rates of from $4 to $4.50 per hour. In accordance with stipulations on the record, Claim-

ant's rate of pay as a welder from 1959 to 1966 was increased from $2.78 per hour to $3.52 per hour. Even if we assume a further increase of thirty percent in wages of a welder in today's market, Claimant's employment in one of the indicated trades would entail no significant loss of earnings. It is evident, therefore, that even if Claimant's pulmonary condition were covered by the Act and even if it were causally related to his employment, the only resulting disability might be a permanent partial loss of perhaps ten percent for reduction in potential job opportunities.

Upon all the evidence adduced, upon my observation of Claimant and the other witnesses who testified at the hearing, and in the light of the foregoing considerations, I make the findings of fact and reach the conclusions of law set forth below.

Findings of Fact

1. Claimant was employed by the Employer as a welder from 1952 until September, 1966, continuously, except for a short period of less than six months. He returned to work in March, 1967, and continued until July, 1967; again returning to work in March, 1968, and continuing until August, 1968. He has not since been employed at any job.

2. In the course of his employment in the Employer's shipyard, he worked almost exclusively ashore, welding steel plates and other components in the

process of fabrication before the launching of the vessels in which they were to be installed.

3. During his employment, sandblasting of limited volume (referred to as "spot-blasting") took place in an area more than fifty feet away from Claimant's place of work.

4. In September, 1966, Claimant was found to have a pulmonary disease for which he was hospitalized and treated at the Veterans Administration Hospital.

5. Since 1966, Claimant has been and still is afflicted with atypical pulmonary tuberculosis due to Group III Battey type bacillus.

6. Claimant's lung condition was not caused by inhalation of fumes or particles of sand or metal.

7. He returned to work in March, 1967, but sustained a relapse in July, 1967, and was out of work until March, 1968, when he again returned to work. In August, 1968, he sustained another relapse and has not been employed at any work since then.

8. In March or April, 1971, Claimant applied for reemployment, but was turned down by the Employer because of his physical condition.

9. Claimant first learned of a possible causal connection between his pulmonary disease and his employment some time in 1971.

10. In June, 1971, his attorney wrote a letter to the Bureau of Employee's Compensation indicating that a claim would be filed. Formal claim was filed in October, 1971.

11. The Employer had knowledge of Claimant's illness in September, 1966, and of his relapses in 1967 and 1968.

12. As a result of his illness, Claimant has sustained permanent physical impairment. He has been found disabled by the Social Security Administration and has been receiving benefits accordingly.

13. Claimant's pulmonary disease has not been cured, but has been in remission for several years. It is likely to be reactivated by undue physical exertion.

14. There are numerous jobs available in the area of Claimant's residence for which he is qualified, or could readily become qualified, by reason of age, education, industrial experience and physical condition.

15. Such available jobs pay from $2.00 to $2.50 an hour during the training period; after approximately one year, the prevailing wage rate is from $4.00 to $4.50 per hour.

16. While working for the Employer, Claimant's rates of pay in two-year increments were as follows: 1959 — $2.78 per hour; 1961 — $3.09 per hour; 1963 — $3.20 per hour; 1965 — $3.52 per hour. In 1967 Claimant's earnings were $2,016.64, and in 1968 his earnings were $3,979.93.

17. By stipulation of counsel for the parties and for the Veterans Administration, the hospital and medical charges of the Veterans Hospital are fixed at $7,000.00.

Conclusions of Law

I. The claim herein was timely filed, and since the Employer had knowledge of Claimant's injury or illness and has not been prejudiced by the failure to give notice in writing within 30 days, the proceeding should not be barred.

II. Claimant's injury or illness did not occur upon the navigable waters of the United States within the meaning of Section 3 of the Act in effect prior to the 1972 amendments, and the claim is therefore not within the coverage of the Act governing Claimant's right to compensation under Federal law.

III. The pulmonary disease contracted by Claimant during the course of his employment did not arise out of that employment.

IV. No disability resulted from Claimant's injury or illness other than a permanent partial loss of potential employment opportunities.

ORDER

Upon the entire record herein, the briefs submitted by counsel, and the foregoing decision, the claim of the Claimant, Tommie L. Fulks, be and the same hereby is rejected.

/s/ ROBERT J. FELDMAN
ROBERT J. FELDMAN
Administrative Law Judge

Dated: September 19, 1975
Washington, D.C.

APPENDIX B

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

TOMMIE L. FULKS
Claimant-Petitioner,

versus BRB No. 75-269

AVONDALE SHIPYARDS, INC.,
Employer-Respondent,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Party in Interest.

DECISION

Appeal from the Decision and Order of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

Hugh G. Oliver, Westwego, Louisiana, for the claimant.

John O. Charrier, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for the employer.

Laurie M. Streeter, Associate Solicitor (William J. Kilberg, Solicitor of Labor), Washington, D.C., for

the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

This is an appeal by the claimant from a Decision and Order (75-LHCA-190) of Administrative Law Judge Robert J. Feldman, dated September 19, 1975. The claim was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

Claimant, who is presently 49 years old, worked primarily as a welder for Avondale Shipyards, Inc. (employer) for approximately 15 years. In 1966, claimant was admitted to the Veterans Hospital, New Orleans, Louisiana, for treatment for tuberculosis. In 1967, claimant was discharged and returned to work as a welder for the employer. However, later in that same year, and again in 1968, claimant's illness recurred and treatment was resumed. Claimant has not worked at any job since 1968. (In 1971, claimant applied for reemployment with the employer, but was turned down because of his physical condition).

During the course of his employment with the employer, claimant was involved in new ship con-

struction, and his duties as a welder were carried out in fabricating plants on land. Claimant testified, however, that occasionally he would be sent to work aboard a floating vessel. Sandblasting would sometimes take place in the vicinity of claimant's welding area.

The claim before the administrative law judge was essentially that claimant's original pulmonary condition, and his relapses in 1967 and 1968, were related to his employment with the employer.

Medical evidence in the record discloses that claimant's condition was diagnosed as atypical pulmonary tuberculosis due to Group III Battey-type bacillus. Doctors' testimony was at variance as to whether claimant's atypical mycobacterial disease was causally related to his exposure to certain dust, sand, gas, and fumes encountered during the course of claimant's employment.

The administrative law judge found that the claim was timely filed pursuant to Section 13 of the Act, 33 U.S.C. §913, and that the claim was not barred pursuant to Section 12 of the Act, 33 U.S.C. §912, since the employer had knowledge of claimant's illness and was not prejudiced by the failure to give written notice. However, it was further found that claimant's injury did not occur upon navigable waters within the meaning of Section 3(a) of the unamended Act, 33 U.S.C. §903(a); that claimant's pulmonary condition was not

causally related to his employment; and that, although claimant's condition has resulted in a permanent physical impairment, he is not economically disabled.

Claimant appeals contending that the administrative law judge's denial of benefits in this case is not in accordance with law.

The Board affirms the finding of the administrative law judge that claimant's injury was not within the jurisdiction of the unamended Act. 33 U.S.C. §903(a). We therefore do not reach the merits of whether claimant's illness is causally related to his employment and whether claimant is disabled within the meaning of the Act.

Prior to the 1972 Amendments to the Act, only injuries actually sustained on navigable waters (including any dry dock) were within the coverage of the Act. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). Further, the construction of new ships on land was considered a non-maritime activity, not a subject of admiralty jurisdiction, and therefore not within the provisions of the unamended Act. *O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 349 F.2d 571 (9th Cir. 1965).

Here, claimant's land-based welding duties involved new ship construction in fabrication plants. There is no evidence that, prior to 1966, claimant ever worked on navigable water, and claimant testified that, although

he had worked afloat occasionally during 1967, his duties as a welder in the industrial division were entirely confined to the yard in 1968.

The administrative law judge, on the basis of the evidence before him, held that claimant's work with the employer was almost exclusively ashore; that the welding he performed was virtually confined to new ship construction; and that therefore the claim did not come within the jurisdiction of the unamended Act. We hold that there is substantial evidence in the record considered as a whole to support the determination of the administrative law judge and that such determination is in accordance with law.

Accordingly, we affirm the denial of the claim in this case on the basis of lack of jurisdiction.

/s/ Ralph M. Hartman
Ralph M. Hartman

We Concur:

/s/ Ruth V. Washington
Ruth V. Washington,
Chairperson

/s/ Julius Miller
Julius Miller, Member

Dated this 16th day of April, 1976

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2578
Summary Calendar*

TOMMIE L. FULKS,
Petitioner-Cross Respondent,

versus

AVONDALE SHIPYARDS, INC.,
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents-Cross Petitioners.

Petitions for Review of an Order of the
Benefits Review Board
(Louisiana Case)

(October 15, 1976)

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

Before GODBOLD, DYER and HILL, Circuit Judges.

PER CURIAM:

Petitioner Fulks seeks review of the administrative denial of workers' compensation disability benefits for a pulmonary condition allegedly caused by his employment. We disagree with the conclusion of the Benefits Review Board that the claim does not come within the purview of the Longshoreman's and Harbor Workers' Compensation Act, as amended, 33 U.S.C.A. §901 *et seq.*, and therefore reverse.

Fulks worked as a shipyard welder for Avondale Shipyards in New Orleans from 1952 until 1966, when he began receiving treatment for a lung condition. In 1967 he was able to resume his job, but after another relapse and resumption of employment, had to leave work at Avondale for the final time in 1968. In 1971 Fulks sought benefits for his disability under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901 *et seq.* After a hearing conducted pursuant to the Act, an administrative law judge found that claimant had "worked almost exclusively ashore" and that therefore his employment fell outside the coverage of the Act.

Prior to its amendment in 1972, the Act provided coverage only for "disability or death result[ing] from an injury occurring upon the navigable waters of the United States (including any dry dock) . . ." 33 U.S.C.A.

§903(a). Claimant's last employment, as well as his "injury", the beginning of his disability, and the filing of his claim, all occurred prior to the effective date of the amendments. The pre-1972 coverage provisions of the Act therefore govern this case.

There is no dispute that Fulks did some welding afloat during his two months employment in 1967. The question is whether it could have validly been found that Fulks was not exposed to airborne sand or iron particles while on the water so as to bring his claim within the Act's pre-1972 coverage. The record before us leaves us in grave doubt that there is any support for the implicit finding of a valid *de minimis* rule of coverage in this case. We therefore remand to the Board for an articulation of the basis upon which rejection of coverage was sustained.

Since the Board did not address the other issues raised by the parties, i.e., the timeliness of filing, causation, and extent of disability, we pretermit consideration of them. See 33 U.S.C.A. §921(c). (Supp. II, 1972).

The cause is remanded for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2578

TOMMIE L. FULKS,
Petitioner Cross
Respondent,

versus

AVONDALE SHIPYARDS, INC.,
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Respondents Cross
Petitioners.

On Petitions for Review of an Order of the
Benefits Review Board (Louisiana Case)

ON PETITION FOR REHEARING

(November 15, 1976)

Before GODBOLD, DYER and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Avondale Shipyards, Inc. in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ John C. Godbold
John C. Godbold
United States Circuit Judge

APPENDIX D

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

TOMMIE L. FULKS,
Claimant-Petitioner,

versus BRB No. 75-269

AVONDALE SHIPYARDS, INC.,
Employer-Respondent,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Party-In-Interest.

Filed: January 4, 1977

DECISION ON REMAND

By its Per Curiam Opinion dated October 15, 1976, the United States Court of Appeals for the Fifth Circuit reversed and remanded this case to the Board "for an articulation of the basis upon which rejection of coverage was sustained."

In *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 1 BRBS 509, BRB No. 74-193 (June 4, 1975), an occupational hearing loss case under the unamended Act, the Board stated:

> [T]hat the amount of time spent over navigable waters during exposure to harmful stimuli causing or aggravating an occupational disease is unimportant and will not lend itself to apportionment between jurisdictions as long as the exposure over navigable waters was sufficient to have at least aggravated the condition.

See Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955).

Upon reconsideration, we are of the opinion that the standard outlined above is equally applicable in this case. However, the unsatisfactory state of the record and findings before us preclude a thorough review of whether Mr. Fulks' claim comes within the coverage of the unamended Act. Further, the issues of causal relationship between claimant's employment and his condition and the extent of his disability, if any, were inadequately developed in the record and cursorily addressed in the decision and order below.

For the foregoing reasons, we remand this case to the Office of Administrative Law Judges for such further development of the record as is necessary to determine whether the claim in question comes within the purview of the unamended Act in light of the standard set forth above. If coverage is so found, we request that thorough and complete findings be made on the ques-

tions of causal relationship and extent of disability, with additional evidence taken and considered as necessary.

/s/ Ralph M. Hartman
Ralph M. Hartman, Member

We Concur:

/s/ Ruth V. Washington
Ruth V. Washington,
Chairperson

/s/ Julius Miller
Julius Miller, Member

Dated this 4th day
of January, 1977

APPENDIX E

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:

TOMMIE L. FULKS,
Claimant,

v. Case No. 75-LHCA-190
OWCP No. 7-19281
AVONDALE SHIPYARDS, INC.,
Self Insured Employer.

Hugh G. Oliver, Esq.
P.O. Box 511
Westwego, Louisiana 70094
For the Claimant

John O. Charrier, Jr., Esq.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street
New Orleans, Louisiana 70112
For the Employer

Before: ROBERT J. FELDMAN
Administrative Law Judge

DECISION AND ORDER ON REMAND

This is a proceeding to obtain disability benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, in effect prior to the 1972 amendments thereof (hereinafter referred to as "the Act").

Statement of the Case

This claim was presented, heard and initially determined upon four issues: timeliness, coverage, causal relationship, and extent of disability. In a decision and order dated September 19, 1975, I concluded from the facts found therein as follows: (1) that the claim was timely filed and the proceeding should not be barred; (2) that Claimant's injury or illness (atypical pulmonary tuberculosis) did not occur upon the navigable waters of the United States within the meaning of the unamended Act and that the claim is therefore not within the coverage of the Act; (3) that the disease contracted by Claimant during the course of his employment did not arise out of that employment; and (4) that no permanent disability resulted from Claimant's injury or illness other than a partial loss of potential employment opportunities. Accordingly, the claim was rejected.

Upon appeal to the Benefits Review Board, it was held that there was substantial evidence in the record considered as a whole to support my determination that the claim did not come within the coverage of the unamended Act, the other issues not being reached. By

order of the Board dated April 16, 1976, the denial of the claim on the basis of lack of jurisdiction was affirmed.

Upon appeal to the Court of Appeals for the Fifth Circuit, the Court stated in a *per curiam* opinion that in view of the undisputed evidence that the Claimant did some welding afloat during his two months employment in 1967, the question is whether it could have validly been found that he was not exposed to airborne sand or iron particles while on the water so as to bring his claim within the Act's pre-1972 coverage. By order dated October 15, 1976, the order of the Benefits Review Board was reversed and the cause was remanded to the Board for an articulation of the basis upon which rejection of coverage was sustained. Consideration of other issues was pretermitted.

In its decision on remand dated January 4, 1977, the Benefits Review Board, quoting from its decision in *McCabe* v. *Sun Shipbuilding and Dry Dock Co.*, 1 BRBS 509 (June 4, 1975), and referring also to Travelers Insurance Co. v. *Cardillo*, 225 F.2d 137 (2nd Cir. 1955), cert. denied 350 U.S. 913 (1955), stated as the standard applicable in this case "that the amount of time spent over navigable waters during exposure to harmful stimuli causing or aggravating an occupational disease is unimportant and may not be apportioned as long as the exposure over navigable waters was sufficient to have at least aggravated the condition." Concluding that the state of the record and findings was "unsatis-

factory", the Board remanded the case to this Office for such further development of the record as is necessary to determine whether the claim comes within the purview of the unamended Act in light of the standard above referred to. The Board also requested that if coverage is so found, thorough and complete findings be made on the questions of causal relationship and extent of disability, with additional evidence taken and considered as necessary.

A supplemental hearing has been held and additional evidence has been received from both parties on the issues of coverage, causal relationship and extent of disability. This determination is therefore made upon the combined record of the entire case remanded to this Office with the Board's decision of January 4, 1977, together with the transcript of the hearing on remand (identified as pages R-1 through R-230), the Exhibits received in evidence at such hearing on remand, and the depositions of two physicians taken thereafter.

The Evidence as to Coverage

The request of the Court of Appeals for an articulation of the basis upon which rejection of the coverage was sustained has been mooted by the disposition made by the Benefits Review Board upon remand. It appears to be appropriate, nevertheless to recall that at the first hearing the evidence as to the extent and proximity of sandblasting was limited to operations ashore. It was shown that Claimant did some welding afloat during

the period of approximately two months in which he was employed in 1967 and it was indicated that some spot blasting may well have been performed afloat during that period, but no evidence was adduced at the first hearing to establish that Claimant had actually been exposed to sandblasting while he was working afloat.[1] Because coverage under the pre-amendment Act was rigidly confined to occurrences beyond the water's edge, irrespective of the employee's usual function or work place, I concluded upon the state of the record at that time that Claimant's injury or illness did not occur upon the navigable waters of the United States within the meaning of Section 3 of the unamended Act. Although it is freely acknowledged that the question of aggravation of a pre-existing condition was neither squarely presented nor considered at that time, it is my belief that due to the absence of proof of Claimant's exposure afloat and the failure to establish that exposure ashore caused or worsened his condition, the evidence at the first hearing would not support a finding of pre-amendment coverage even under the standard announced by the Board.

Now, however, there is ample evidence to fill the gap with respect to exposure. Given a second chance by the remand, Claimant has produced the testimony of four former fellow-workers, three of whom averred that

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1 The Court of Appeals showed its awareness of the soft spot in the proof when it posed the question at page 2 of its *per curiam* opinion as to whether it could have validly been found that Claimant was not exposed to airborne sand while on the water.

they had actually worked in the same crew as Claimant and that members of the crew, including Claimant, had been exposed to sandblasting while at work on the water. Their testimony, which was uncontradicted, included estimates of the proximity of the sandblasting to the welding operation varying from 50 to 200 feet and a description of the density of the sand in the air over the river as being "like if you were in a desert".[2] In any event, I fully credit Claimant's recollection that on at least two occasions during his short period of employment in 1967, sandblasting took place about 125 feet away from him while he was at work afloat.

The Applicable Law

In its decision on remand, the Benefits Review Board applied the rule of no apportionment between jurisdictions laid down in *McCabe, supra,* to the facts of this case. That adaptation of the principle enunciated by the Court of Appeals, Second Circuit, in *Travelers Insurance Co.* v. *Cardillo, supra,* is thus not only the law of the case with respect to coverage, but a clear guideline for the determination of causal relationship. The *Cardillo* rule was recently reaffirmed by the Court of Appeals, Second Circuit, in *General Dynamics Corporation, Electric Boat Division* v. *Benefits Review Board, et al.,* Nos. 77-4049 and

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2 Some of this testimony approaches a state of overkill. If believed, it might cast some doubt upon the finding that Claimant was unaware of the connection between his condition and his work until informed by his physician in 1971.

77-4088 (October 26, 1977), the rationale being stated as follows:

> The *Cardillo* court was fully aware of the problem. Judge Medina, who wrote for the court, recognized that, "it would be sheer folly to seek or expect to discover a formula devoid of any possibility of inequity or seeming injustice." 225 F.2d at 144. His conclusion that the last carrier bear the sole responsibility was grounded on two major considerations. The first was the great difficulty, if not practical impossibility, in determining with any degree of medical certainty: a) the time within which occupational diseases develop; b) the extent of damage at any particular date as the disease evolves; or c) the correlation of the progression of the disease with specific industrial experiences.
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> . . .
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> Secondly, Judge Medina concluded that the answer to the question to be resolved was evident from the legislative history of the Act, which was fully discussed in his opinion. 225 F.2d at 145. That history revealed that Congress was not unaware of possible apportionment of liability among either employers or carriers. A suggestion was made by an employer representative that the Act should contain a provision limiting the proportion of

> the total award for which an employer could be liable to the same ratio as the extent of the damage incurred during the period worked for that employer bore to the total disability.
>
> . . .
>
> Judge Medina concluded that the same administrative considerations, such as the conjectural and unsatisfactory nature of medical estimates for occupational diseases, which persuaded Congress to adopt a different rule for employers than the one suggested, applied equally to carriers. [Slip Opinion, pp. 135, 136]

Similar considerations support the Board's application of the *Cardillo* rule to the factual situations in *McCabe, supra,* and in this case with respect to exposure to harmful stimuli causing or aggravating an occupational disease. Measured by that standard, the evidence in the entire record as to exposure afloat in 1967 is sufficient to support coverage under the unamended Act.

Causal Relationship

At the initial hearing, Claimant's physician testified that in his opinion the exposure to sandblasting at work was an essential causal factor in Claimant's condition. The Employer's physician testified that in his opinion Claimant's condition was not causally related to his work. In my original decision, I reviewed what I con-

sidered to be the significant portions of the testimony of each of these physicians; made a choice between their irreconcilable views; and stated clearly my reasons for accepting and adopting the opinion that Claimant's mycobacterial infection was not caused by the inhalation of silica from sandblasting or other conditions of his employment. In his brief to the Court of Appeals, however, the Solicitor not only suggested that my discussion, findings and conclusion on that issue, as well as the issue of extent of permanent disability, be disregarded as mere *obiter dicta*, but described them as incomplete, defective, ambiguous and indefinite; and in its decision on remand, the Board characterized such issues as "cursorily addressed in the decision and order below".[3]

Irrespective of the depth of their previous treatment, the issues must now be discussed *in extenso* and the proof of causation must be weighed on a different scale. Rather than looking solely to the origin of the disease, we may predicate liability merely upon evidence that Claimant's pulmonary condition was aggravated or worsened or prolonged in any degree by some aspect of his employment.

On remand, Claimant proffered the testimony of Howard A. Buechner, M.D., a distinguished professor of medicine at Louisiana State University Medical School. Although not engaged in private practice, he is

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3 No comment.

a prominent consultant and prolific writer in the field of diseases of the chest.[4] Prof. Buechner has never examined Claimant, but upon a review of his medical records and x-rays, he diagnosed Claimant's condition as an infection of the lungs caused by a germ known as the Battey bacillus and stated that in his opinion that condition arose from his work as a welder. He also stated his belief that Claimant was suffering from silicosis, his opinion being based on changes in the x-rays he believed to be compatible with silicosis and upon his understanding of a history of 15 years employment in the shipyard during which he worked somewhere in the vicinity of sandblasting about one-third of the time.[5] He advanced the theory that inhalation of silica predisposes one to Battey bacillus infection, and in support of that theory referred to a statistical "study" showing that the risk of acquiring Battey bacillus infection is between 6,884 and 16,206 times greater in silicotics than in the general population.[6] A significant portion of Prof. Buechner's testimony, in my view, was

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4 Prof. Buechner testified that the only patients he sees are those at Charity Hospital. His curriculum vitae and bibliography cover 23 typewritten pages.

5 With respect to the x-rays, Prof. Buechner admitted that he could not categorically say that this is silicosis.

6 The "study" of the incidence of tuberculosis and atypical mycobacterial infection (Employer's Exhibit G) was prepared for this case at Prof. Buechner's request and consists of a brief recapitulation of case statistics purportedly contained in three published articles. It was submitted without any validation of the raw data on which it was based and without disclosure of the methodology employed.

his statement and restatement to the effect that the inhalation of free silica has a lethal effect on certain cells in the lungs known as macrophages, which can ingest many microscopic foreign substances including bacteria, but which are destroyed by sand. If the macrophages are killed by silica they are no longer present to ingest bacteria inhaled into the lungs, and the patient therefore becomes more susceptible to bacterial infections.

On behalf of the Employer, Dr. Hans Weil, a specialist in pulmonary diseases, supplemented his testimony at the first hearing by re-examining the Claimant shortly after the hearing on remand and thereafter submitting his testimony by deposition. He reconfirmed his opinion that Claimant has a mycobacterial disease (now inactive) which is not causally related to his occupational activities; that he does not have silicosis; and that he had sustained no lung impairment as a result of siderosis. He emphasized that mere exposure to sandblasting does not necessarily result in silicosis; that exposure cannot be equated with disease. While he agreed that people afflicted with silicosis were more susceptible to mycobacterial infection than others, he pointed out that there is little or no evidence of any increased risk of such infection among people who have been exposed to sandblasting but have not contracted silicosis. Dr. Weil further stated that cigarette smoking has been shown to impair the function of alveolar macrophages, and that on his most recent examination Claimant had stated that he continues to smoke a

pack of cigarettes each day. It is noted that he agreed with the proposition that the ingestion of silica has a lethal effect upon the macrophages, altering the body's defenses against infections such as tuberculosis; the question, he added, is what is the level of exposure necessary to have a sufficient effect on macrophage defense function in order to make the individual a greater risk of developing these infections?

Dr. Jay M. Shames, similarly a specialist in pulmonary diseases, also testified by post-hearing deposition taken on behalf of the Employer. He was not given an opportunity to examine the Claimant, and his opinions, like those of Prof. Beuchner, are based upon his review of the medical records and x-rays. His views generally coincided with those of Dr. Weil with respect to the presence of mycobacterial infection attributed to Battey bacillus and with respect to the absence of any silicosis. Based upon his review of Claimant's x-rays taken at intervals from September, 1966 until October, 1976, as well as the pulmonary function studies that were done, he viewed the findings as completely compatible with tuberculosis and chronic obstructive lung disease (chronic bronchitis and emphysema). He was aware of the higher incidence of mycobacterial infection amongst people who actually had silicosis, but like Dr. Weil, did not see mere exposure to or inhalation of silica of itself as magnifying the risk. He viewed macrophages as one of many defense mechanisms against infection which may be impaired by the penetration of irritants such as cigarette smoke into

the lungs. No doubt, free silica would be such an irritant.

Upon all of the medical evidence adduced on the whole case, I am satisfied that Claimant's atypical tuberculosis or mycobacterial disease was not caused by his exposure to sandblasting, that he has not at any time been afflicted with silicosis, and that he has sustained no lung impairment due to siderosis. The experts are in agreement on the diagnosis of mycobacterial infection due to the Battey bacillus. Though the etiology of that disease is not as clearly defined as the sources of some better-known illnesses, it is widely accepted that its origins are in the soil. Certainly, the record in this case does not establish that it is indigenous to shipyards, or that it is a recognised occupational disease of welders or of sandblasters, or that it is derived from inhalation of free silica. It is perfectly clear that Battey bacillus infection as such does not originate in exposure to sandblasting.

The attempt is made, however, to link Claimant's condition to such exposure by suggesting that he also has another disease, to wit, silicosis. Despite the fact that the medical records (notably the results of pulmonary function tests and clinical observations showing no progression over a ten-year period) clearly indicate to the contrary, the presence of silicosis is sought to be established by reference to an ambiguous x-ray picture which even Prof. Beuchner admits is inconclusive, and by resort to a questionable "study" showing

that the incidence of Battey bacillus infection is much greater in silicotics than in the general public.[7] I am not persuaded. A finding that Claimant does not have silicosis is amply supported by the clinical evidence and the testimony of Dr. Weil and Dr. Shames.

Absent silicosis, the testimony as to exposure to sandblasting prior to 1967 has little probative value on the issue of causation. As shown above, such exposure did not bring about the Battey bacillus infection sustained by Claimant in 1966. Nor can it be reasonably inferred from the evidence that it contributed to the onset of that illness. Even if it be assumed that some inhalation of silica might have resulted in destruction of some macrophages, it has not been shown that resistance to the Battey bacillus in particular was lowered thereby, or that before the lungs had been deleteriously affected by the Battey bacillus, other natural defenses would not have neutralized or absorbed the silica without injury. As the health of a majority of sandblasters would indicate, exposure to sand does not necessarily produce mycobacterial infection.

After Claimant had become infected with mycobacterial disease, however, it is not unreasonable to draw the inference that because his lung tissue and/or respiratory organs were then subnormal or in weakened

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7 Apparently, the logic behind this argument is analogous to a false syllogism such as: Cross-country runners frequently have enlarged hearts. A one-legged man has an enlarged heart. Therefore, he is likely to be a cross-country runner.

condition, though the disease was dormant, any destruction of defenses against bacteria might be enough to aggravate or reactivate the infection. Although the entire record with respect to the frequency, duration, density and proximity of the sandblasting leaves much to be desired, I am persuaded that upon Claimant's return to work in 1967, such exposure as he had to sandblasting was sufficient, under the so-called *McCabe* standard adopted by the Board, to aggravate his condition or to contribute (along with his continuing self-inflicted injury resulting from cigarette smoking) to its reactivation.

The Extent of Disability

For purposes of the time limitations for filing claims in occupational disease cases, it is held that the date of injury is the date upon which Claimant became intelligently aware of the connection between his illness and his work. See *Aerojet General Shipyards* v. *O'Keeffe*, 413 F.2d 793 (5th Cir. 1969). For purposes of fixing liability, however, one must look to the date upon which compensable disability commenced. Since there is no proof that Claimant's exposure to sandblasting prior to 1967, was causally related to his illness, his original disability in 1966 is not compensable. His covered disability begins with the aggravation of his condition which is marked by his relapse and hospitalization on July 1, 1967.

The evidence will not support a finding of permanent total disability. Except for the periods of hospitalization or temporary total disability hereafter referred to, Claimant has not been under doctor's orders to refrain from work.[8] His former work, or other work requiring heavy exertion, may be barred, but there are no other restrictions on his activity.

On remand, Claimant proffered testimony of William B. Dunn, Esq., who is associated with Claimant's counsel in the practice of law and who was formerly a personnel manager in an industrial plant. Mr. Dunn stated that, in his opinion, most employers would refuse to hire Claimant for any job because he was a poor compensation insurance risk.[9] No factual evidence of refusal on that ground is available, however, because with the exception of a single unsuccessful attempt to be re-employed at Avondale in 1970, Claimant has not tried to find another job during the nine years since his last employment.

In addition to the detailed evidence adduced at the initial hearing as to the Claimant's employability and

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8 Upon discharge from the Veterans Administration Hospital on August 23, 1968, Claimant's record contains the notation that he is to resume employment following the next clinic visit, which appears to have been September 5, 1968.

9 While this may be a realistic view prevalent in some personnel departments, it borders upon discrimination against compensation claimants or against the handicapped and perhaps is not cognizable in view of Section 49 of the Act and the Rehabilitation Act of 1973 (29 U.S.C. §793 and 794).

job opportunities, the Employer presented on remand testimony of its own personnel director and of Mr. Edward J. Ryan, Director of Student and Rehabilitation Services for the West Bank Campus of Delgado College and a specialist in vocational rehabilitation of the handicapped. Mr. Ryan estimated that Claimant's physical limitation might deprive him of the opportunity of working at one out of eight or nine available jobs, or a loss of about 12 percent of employment potential. He also indicated that a period of rehabilitation might extend anywhere from three months of on-the-job training to a total of as much as 18 months of part-time or full-time schooling and retraining.

Upon all the evidence as to the economic effect of his condition, it is fair to conclude that as a result of his illness Claimant, now about 50 years old, has sustained permanent partial disability to the extent of something less than 25 percent of his earnings. His hourly rate in 1967 and 1968 was $3.68 and it has been stipulated that he worked a 45-hour week. His average weekly wage was thus $165.60. Because Claimant has had no actual earnings since 1968, his wage-earning capacity is determined under the provisions of Section 8(h) of the Act. Having due regard to the nature of his injury, the degree of his physical impairment, which precludes his engaging in his usual employment as a welder and in other occupations requiring heavy exertion, his employability in other occupations, the availability of jobs that he is capable of performing at wage scales comparable to that of a welder, the probability of

short-term reduction in earnings should formal retraining be necessary, the possibility that some employers might hesitate to hire him because of his physical condition, and the effect of his disability as it may extend into the future in light of the st nine or ten years, I find it reasonable to fix his earning capacity at $125.00 per week. In accordance with Section 8(c)(21) of the Act, he is entitled to compensation for permanent partial disability of $27.07 per week, which is 66 2/3 percent of the difference ($40.60) between his average weekly wage and his wage-earning capacity.

Supplemental Findings of Fact

Upon the entire record my observation of the witnesses and my judgment of their credibility, I make the supplemental findings of fact set forth below. To the extent that any of the following findings are at variance with the findings of fact enumerated in my initial decision, the following findings shall prevail.[10]

18. Since the Battey bacillus with which Claimant became infected in 1966 does not stem from inhalation of free silica, such exposure as he may have had to sandblasting prior to 1967 was not a causative factor in the onset of his illness.

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10 No new evidence on the question of timeliness having been introduced, previous findings and conclusions on that issue remain unchanged.

19. After the acute stage of his illness had subsided and he had recovered sufficiently to return to work, the disease was still present, although dormant; by reason of the consequent impairment of the natural capacity of his lungs to resist further bacterial infection, he then became vulnerable to the inhalation of irritants such as silica, among others.

20. Claimant does not have, nor has he ever had, silicosis.

21. Claimant does not have, nor has he ever had, any lung impairment due to siderosis.

22. After his return to work in 1967, Claimant was exposed to sandblasting on at least two occasions while he was at work over navigable waters within 125 feet of the sandblasting operation.

23. After his initial illness in 1966, Claimant returned to work on March 27, 1967; he continued working through June 30, 1967, but suffered a relapse or reactivation of his mycobacterial infection as a result of which he was temporary totally disabled from July 1, 1967 through March 10, 1968. He resumed work from March 11, 1968 through August 8, 1968, at which time he suffered another relapse or reactivation of the same illness. As a result, he was temporarily totally disabled from August 9, 1968 through September 5, 1968; he was again hospitalized from September 20, 1974 through September 27, 1974.

24. The exposure to sandblasting in 1967, contributed in some degree to the aggravation or reactivation of Claimant's illness commencing July 1, 1967.

25. From November 21, 1966 until July 13, 1968, Claimant's hourly rate was $3.68; he worked 45 hours per week; his average weekly wage was $165.60.

26. After his illness, Claimant's reasonable earning capacity was $125.00 per week.

Conclusions of Law

Conclusions numbered II, III, and IV in my original decision are vacated. In lieu thereof, I reach the following conclusions from all the findings of fact in the entire case:

II. The aggravation or reactivation of Claimant's illness in 1967 resulted from injury occurring upon the navigable waters of the United States and was within the coverage of the Act prior to the 1972 amendments.

III. The aggravation or reactivation of Claimant's mycobacterial infection was sustained in the course of his employment and arose naturally out of that employment.

IV. As a result of such aggravation or reactivation of Claimant's illness, he was temporarily totally disabled from July 1, 1967 through March 10, 1968, from

August 9, 1968 through September 5, 1968, and from September 20, 1974 through September 27, 1974; and since September 6, 1968 he has been permanently partially disabled to the extent of a loss of earning power of $40.60 per week.

V. Claimant is entitled to compensation at the rate of $70.00 per week (the applicable maximum) for temporary total disability and $27.07 per week for permanent partial disability.

VI. In accordance with the applicable Regulation (20 CFR §702.132), a fee in the sum of $4,200.00 is reasonably commensurate with the actual necessary work performed and the commendable perseverance demonstrated by Claimant's counsel, together with allowable disbursements of $350.00 for the fees of the two expert witnesses as requested. Under the circumstances, any delinquency in payment of the compensation ordered herein is excused under the provisions of Section 14(e).

ORDER

IT IS HEREBY ORDERED that the self-insured Employer, Avondale Shipyards, Inc., pay to the Claimant, Tommie L. Fulks, compensation for temporary total disability at the rate of $70.00 per week for the periods from July 1, 1967 through March 10, 1968, from August 9, 1968 through September 5, 1968 and from September 20, 1974, through September 27,

1974, and compensation at the rate of $27.07 per week for permanent partial disability from September 6, 1968 to date and during the continuance of such partial disability, together with interest on unpaid installments at the rate of six percent per annum, subject to pertinent provisions of the Act; and it is further

ORDERED that said self-insured Employer pay to Hugh G. Oliver, Esq., the sum of $4,200.00 as and for his fee for services rendered to the Claimant herein, together with the sum of $350.00 for expert witness fees paid or incurred herein; and that it pay to the Veterans Administration the reasonable charges for hospitalization and medical services furnished to Claimant since July 1, 1967.

/s/ ROBERT J. FELDMAN
ROBERT J. FELDMAN
Administrative Law Judge

Dated: December 30, 1977
Washington, D.C.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of
TOMMIE L. FULKS,
Claimant,

v. Case No. 75-LHCA-190
OWCP No. 7-19281
AVONDALE SHIPYARDS, INC.,
Self Insured Employer.

CORRECTION

In the Decision and Order on Remand dated December 30, 1977 herein, the underscored line below was inadvertently deleted in the retranscription of the continued paragraph at the top of page 11 (See 45a):

". . . and the effect of his disability as it may extend into the future in light of the fact that his disease has not materially progressed over the past nine or ten years, . . ."

/s/ ROBERT J. FELDMAN
ROBERT J. FELDMAN
Administrative Law Judge

Dated: January 3, 1978
Washington, D.C.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

TOMMIE L. FULKS,
Claimant-Petitioner,

v. Case No. 75-LHCA-190
OWCP No. 7-19281

AVONDALE SHIPYARDS, INC.,
Employer-Respondent.

DECISION AND ORDER
ON PETITION FOR RECONSIDERATION

By petition duly served February 15, 1978, Claimant seeks reconsideration of my Decision and Order on Remand, dated December 30, 1977, and filed in the Deputy Commissioner's office on February 10, 1978. Since the Employer has submitted nothing in opposition thereto, consideration has been given to each of the "reasons" stated by Claimant's counsel, despite the fact that except for the question of disbursements, the petition is obviously inadequate on its face.

Preliminarily, it is noted that Claimant served a Notice of Appeal on February 12, 1978 from the same

Decision and Order on Remand. The petition for reconsideration having been duly served and filed within the ten day limitation of Rule 59, F.R.C.P., however, the prior filing of the Notice of Appeal apparently does not oust the Administrative Law Judge of jurisdiction to entertain an application for reconsideration. See *McCabe v. Sun Shipbuilding & Dry Dock Co.*, BRB No. 77-228, etc. (January 31, 1978).

Other than the implicit argument that counsel disagrees with my conclusions, the petition contains not a single reference to any fact or circumstance, or to any legal reasoning or authority, that even suggests that any change in my decision is warranted in the slightest degree. Consequently, upon reconsideration of the "reasons" enumerated (1) through (4) in the petition, the original decision is adhered to.

With respect to item (5), I do not recall that the cost of the transcript was included in the disbursements listed in counsel's application for a fee submitted after the hearing on remand. In any event, it is recoverable. See *McIntosh v. Parkhill-Goodloe Co.*, 4 BRBS 3 (1976). The item designated as "Research - $400.00" was disallowed on the original application. Prof. Buechner was allowed his expert witness fee of $250.00 as requested. I find no authorization in Section 28 of the Act or elsewhere for reimbursement for medical research.

ORDER

The Employer above-named is hereby directed to pay the Claimant above-named the sum of $149.47 to reimburse him for the expense of the transcript of the hearing on remand. In all other respects, the Decision and Order on Remand dated December 30, 1977, is adhered to and confirmed.

/s/ ROBERT J. FELDMAN
ROBERT J. FELDMAN
Administrative Law Judge

Dated: April 6, 1978
Washington, D.C.

APPENDIX F

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

TOMMIE L. FULKS,
Claimant-Petitioner,
Cross-Respondent,

versus BRB Nos. 78-369A
& 78-369B

AVONDALE SHIPYARDS, INC.,
Self-Insured Employer-
Respondent,
Cross-Petitioner.

Filed: March 30, 1978

DECISION

Appeal from the Decision and Order on Remand of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

Hugh G. Oliver, Westwego, Louisiana, for claimant.

John O. Charrier, Jr. (Jones, Walker, Waechter, Poitevent, Carrere and Denegre), New Orleans, Louisiana, for employer.

Before: SMITH, Chairman, MILLER and KALARIS, Members.

MILLER, Member:

These are appeals by both parties from the Decision and Order on Remand (75-LHCA-190) of Administrative Law Judge Robert J. Feldman pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (hereinafter, the Act).

Claimant was a welder during the better part of his employment with employer from 1952 to 1968. In September 1966 he was hospitalized for a form of pulmonary tuberculosis called atypical mycobacterial disease, caused by infection of his lungs by an organism known as the Battey bacilius. This germ, apparently endemic to the soil in rural areas of the southeastern United States, may lie dormant in the lungs for long periods and only become active when the lungs' biological defenses against it and other organisms are weakened for some reason. He also exhibited fine interstitial changes in the lower portions of both lungs on x-ray films. Claimant returned to work one month after being released from the hospital in February 1967, but again left work for treatment of a relapse of active atypical mycobacterial disease in July 1967. Claimant again returned to work in March 1968, only to leave again in August 1968 due to reactivation of the disease. He has not worked since August 1968. Beside

the atypical mycobacterial disease, claimant suffers from chronic bronchitis and possibly from non-disabling siderosis due to iron deposits left in his lungs from inhalation of welding fumes. Claimant also was frequently exposed to free silica crystals in the air caused by sandblasting anywhere from 50 to 200 feet away from his welding site, although it appears that this exposure has not resulted in silicosis.

The case arrives here after a tortured procedural history. On September 19, 1975 the administrative law judge held that claimant had given employer timely notice of his injury and had filed a claim under the Act in a timely fashion, but that the claim did not arise within the coverage of the Act because there was no evidence that any exposure to disease-producing agents occurred over navigable waters as required by Section 3(a) of the Act prior to the 1972 amendments. The administrative law judge also held that claimant's condition was not causally related to exposure to free silica at work, and that claimant suffered no present loss of wage-earning capacity. The Board affirmed this denial of benefits solely on the ground that the claim was not covered by the pre-amendment Act, without reaching the other issues. *Fulks v. Avondale Shipyards, Inc.*, 3 BRBS 415, BRB No. 75-269 (April 16, 1976). However, the United States Court of Appeals for the Fifth Circuit reversed this determination, stating:

> There is no dispute that Fulks did some welding afloat during his two months employ-

> ment in 1967. The question is whether it could have validly been found that Fulks was not exposed to airborne sand or iron particles while on the water so as to bring his claim within the Act's pre-1972 coverage. The record before us leaves us in grave doubt that there is any support for the implicit finding of a valid *de minimis* rule of coverage in this case. We therefore remand to the Board for an articulation of the basis upon which rejection of coverage was sustained.

5 BRBS 390, 391, 541 F.2d 279 (table listing) (5th Cir. 1976).

Upon remand, the Board held that the issue of coverage is governed by *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 1 BRBS 509, 515, BRB No. 74-193 (June 4, 1975), *rev'd on other grounds*, No. 78-1378 (3d Cir., Feb. 22, 1979): "The amount of time spent over navigable waters during exposure to harmful stimuli causing or aggravating an occupational disease is unimportant and will not lend itself to apportionment between jurisdictions as long as the exposure over navigable waters was sufficient to have at least aggravated the condition." Holding the record inadequate to assess whether the disability is covered by the Act, the Board remanded for further development of the evidence, and for further development of the reasons for the administrative law judge's original holdings on causal relationship of the disability to work and on the nature and extent of dis-

ability. 5 BRBS 392.1, BRB No. 75-269 (Jan. 4, 1977). The administrative law judge held a second hearing and issued his Decision and Order on Remand on December 30, 1977 (later supplemented by a brief Decision and Order on Petition for Reconsideration, the relevant aspects of which merely adhered to the Decision and Order on Remand). It is from the Decision and Order on Remand that this appeal springs.

In the Decision and Order on Remand, the administrative law judge reaffirmed his findings on the issues of timeliness of notice and claim. He emphatically held that claimant's exposure to sandblasting did not bring about his atypical mycobacterial disease, that claimant does not suffer from silicosis and that he is not disabled by siderosis. He accepted the evidence that silica crystals destroy macrophages, cells which form one of the lungs' means of defense against infections such as that of the Battey bacillus (silicotics for this reason present a greater risk of suffering such pulmonary infections), but held that, absent silicosis, there is insufficient evidence that any pre-September 1966 exposure to silica dust contributed to claimant's condition by lowering his resistance to the dormant Battey bacillus. However, the administrative law judge found it reasonable to infer that claimant was more susceptible in 1967 than 1966 to relapse of the mycobacterial disease by defense-weakening exposure to silica because his lungs had already been weakened by the disease itself. Relating this to the issue of coverage by the Act, the administrative law judge held that, under *McCabe*,

supra, the exposure of claimant to sandblasting while working upon navigable waters on two occasions in 1967 is sufficient to bring the claim of aggravation of his disease by such exposure within the Act. Holding that there is work which claimant can perform within his physical limitations, the administrative law judge found that claimant had suffered a permanent partial loss of wage earning capacity to the extent of $40.60. He also awarded claimant's attorney a fee of $4200.

Employer's appeal (78-369B) contests the same areas which were in issue in the earlier history of this case, namely the findings regarding coverage of the Act, timeliness of notice and claim, causal relationship of claimant's condition to his work with employer, and the extent of claimant's disability, if any. Employer also contests the award of an attorney's fee to claimant, simply noting that since the Decision and Order on Remand "must be reversed" for the reasons set forth in its brief, no attorney's fee may legally be assessed against it.

Claimant's appeal (78-369A) assigns error to many facets of the Decision, but he fails to brief, with facts and argument for our consideration, all but two such issues. His assignations of error in the finding of no lung impairment due to siderosis, in the finding of average weekly wage, and in the attorney's fee award will not be addressed in this decision because they have not been briefed. *Shelton v. Washington Post Co.*, 7 BRBS 54, BRB No. 76-358 (Dec. 15, 1977). The issues which

have been briefed aver that claimant does suffer silicosis and therefore the exposure to silicosis-producing agents before 1967 contributed to the onset of his atypical mycobacterial disease, and that claimant is permanently totally disabled.

The relevant facts are these. Claimant was a welder for employer for the major portion of the period 1952 to 1968. In September 1966 he was hospitalized for what was ultimately diagnosed as atypical mycobacterial disease due to the Battey bacillus. He returned to work in March 1967, but had suffered a relapse by July 1, 1967 and left his employment until March 1968. At that time he returned again and worked entirely ashore until he suffered another relapse in August 1968. He has not worked since. In his welding position, claimant was frequently exposed to free silica through working in the vicinity of sandblasting operations. This exposure took place both on land and on water. Claimant specifically remembered two occasions during his brief return to work in 1967 when he was exposed to such irritants while working upon navigable waters. It appears that the sandblasting which led to claimant's exposure on these two projects was being carried out on land some 50 to 200 feet away and the clouds of dust wafted onto the projects upon which claimant was working.

Seven of claimant's former co-workers and supervisors testified at both hearings. The supervisors, testifying for employer at the original hearing, attempted to

downplay the exposure of claimant to sandblasting by noting that it was either far away (50 to 350 feet) or not very frequent, although employees were moved all over the yard and they could not say how often claimant was exposed to sandblasting while upon navigable waters. Four co-workers testified at the second hearing that there was frequent exposure to sandblasting, that it was frequently quite close, and that it would tend to waft over to where the welders worked even though it was not being carried on nearby. Some of these co-workers corroborated the specifics of the jobs which claimant worked upon navigable waters in 1967, although the administrative law judge appears to rely mainly on claimant's testimony for these jobs.

It was agreed by all medical experts that claimant suffers atypical mycobacterial disease caused by the Battey bacillus, and that silica crystals have a lethal effect on macrophages. Beyond that the medical evidence is in conflict. Dr. Buechner stated his opinion that exposure to silica dust, without the development of silicosis, would be sufficient to kill the macrophages, and because of this loss of infection defense claimant was predisposed to a reactivation of his Battey bacillus. Dr. Brown seemed to agree with this assessment in the original hearing in 1975, although he believed claimant to be suffering minimal silicosis and siderosis. However, Dr. Weill and Dr. Shames took issue with this opinion, stating that there is no scientific evidence for it. Regarding the presence of silicosis (rather than the mere exposure to silica dust, which all doctors

agreed was present), Drs. Brown and Buechner felt that silicosis was present, but based this only on history and on evidence of interstitial fibrotic changes in x-rays which Dr. Buechner admitted were equivocal on the issue. Drs. Shames and Weill testified that the fact that claimant's pulmonary function has improved over the ten year course of his disease indicates that there is no silicosis present because silicosis is generally a progressive disease. The presence or absence of siderosis does not appear to be significant, because all doctors testified that this is a benign disease which produces no disability in most cases.

At both hearings, there was vocational testimony to the effect that claimant can perform certain specified jobs, such as security guard or retail sales clerk or cashier without the necessity of much retraining, and that such jobs were available at the time of both hearings. Other available jobs which would require more retraining include watch repair, meter repair, and bench assembly. There was also testimony that these jobs would pay at least the minimum wage, and that some would pay much more after a period of retraining.

In arguing the issue of coverage of the claim by the Act, the parties have not contested that claimant's 1967 exposure to free silica upon navigable waters, the only exposure which could bring his claim within the coverage of the pre-amendment Act, occurred on only two occasions during his brief return to work in that year

Employer contends that "no rule of law would be so unfair as to impose liability for such a minimal connection [to admiralty jurisdiction] or with such a minimum of causation." Brief at 5. However, we conclude that the Fifth Circuit's per curiam opinion remanding the issue to the Board, and the Board's opinion in turn remanding the issue to the administrative law judge, form the law of the case. The Fifth Circuit stated its disagreement with the Board's previous denial of coverage and, noting claimant's work on the water in 1967, expressed its "grave doubt that there is any support for the implicit finding of a valid *de minimis* rule of coverage in this case." 5 BRBS at 391. The Board's Decision on Remand quoted *McCabe, supra,* to the effect that the amount of time spent over navigable waters while exposed to irritants is unimportant as long as the irritants aggravate the claimant's disabling condition. 5 BRBS at 392.1. This holding is based on the last employer rule of *Travelers Insurance Co. v. Cardillo,* 225 F.2d 137 (2d Cir. 1955), *cert. denied sub nom. Ira S. Bushey Co. v. Cardillo,* 350 U.S. 913 (1955), that the last employer with whom a claimant was exposed to injurious stimuli before the claimant became aware that the disability was work related is liable for all compensation, regardless of the length of exposure. The holding gains support from the later case of *Sicker v. Muni Marine Co.,* 8 BRBS 268, BRB No. 77-470 (April 27, 1978). Our task, then, is to determine whether substantial evidence supports the administrative law judge's finding of aggravation of the condition by this minimal water-based exposure, for under the applicable law if the con-

dition was aggravated by this exposure the case comes within the Act. This necessarily involves a determination of the causal relationship issue.

The administrative law judge inferred on remand that water-based exposure in 1967 to free silica crystals contributed in some degree to the relapse of atypical mycobacterial disease in claimant's already-weakened lungs. The inference of aggravation at issue here is explicitly based by the administrative law judge on the evidence that silica destroys the macrophage defenses of the lung against reactivation of infections such as claimant's still-present Battey bacillus, and on the evidence that claimant's weakened lungs were exposed to destructive silica dust while working upon navigable waters in 1967. Lending additional support is the obvious fact that claimant indeed suffered a relapse, as could be predicted by any reading of the medical evidence accepted by the administrative law judge. This inference is reasonable. Direct evidence of such a relationship was unavailable absent biopsy or autopsy. It is the prerogative of the administrative law judge to weigh the evidence and draw inferences therefrom, including the medical evidence, *Todd Shipyards, Inc. v. Donovan*, 300 F.2d 741 (1962), and the Board must accept these inferences if they are supported by substantial evidence and are rational and in accordance with law. *O'Keeffe v. Smith Associates*, 359 U.S. 380 (1965). We hold that substantial evidence supports this finding that claimant's condition was aggravated to some degree by

his water-based exposure to free silica in 1967, and consequently that his claim is covered by the Act.

Employer also argues that there is no coverage under the Act because any exposure during claimant's last period of employment in 1968 was entirely ashore. Under the "last employer rule" of *Travelers Insurance Co., supra,* employer argues that this fact places coverage under Louisiana Law. *McCabe, supra,* rejected a similar argument that liability should be apportioned between state and federal remedies where only ten percent of the exposure to injurious stimuli was upon navigable waters. We also reject employer's argument in this case. *Travelers* is a rule of liability assessment, not of jurisdiction. Exposure upon navigable waters is sufficient to bring the claim within the Act. The fact that other exposures were within the coverage of a state act does not limit the applicability of the Act to the aggravation of a condition which is thus concurrently within a state's jurisdiction. *See Calbeck v. Travelers Insurance Co.,* 370 U.S. 114 (1962). Employer here is the last employer for whom claimant worked, and is thus within the scope of the Act's jurisdiction by virtue of claimant's water-based exposure to irritants even though the last work claimant performed for it was performed ashore. There is no indication in *Travelers* that the three claims presented there would have been barred if the claimants, who worked variously "in repair of vessels", "around ships" and "in noisy places," 225 F.2d at 140-142, had not worked upon navigable waters on the day before the date upon which the cumulative effects

of the exposure first manifested themselves. Were we to accept employer's argument, any employer could simply shift an employee to non-covered employment after years of injurious exposure, and frustrate the purposes of the Act.

Claimant argues that the administrative law judge erred in not finding that claimant had silicosis in 1966, and in not finding the 1966 onset of atypical mycobacterial disease causally related to the presence of silicosis. Again, it is for the administrative law judge to draw inferences from the evidence, including the medical evidence. *Todd Shipyards, supra.* The administrative law judge accepted the evidence that silicosis could not be diagnosed because the suspicious x-ray changes have exhibited no progression over the years, as would be expected in the case of a silicotic. He believed the medical testimony that lowered resistance to the Battey bacillus in 1966 would have required a medical finding of silicosis, not merely the inhalation of destructive silica without development of full-fledged silicosis which he inferred was sufficient to contribute to a relapse in lungs already ravaged by disease in 1967. We affirm these findings.

Regarding the questions of whether the notice of injury was given to employer and the filing of the claim was accomplished in a timely fashion under Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, we note that the type of tuberculosis from which claimant suffers

does not arise naturally out of his employment. Strictly speaking, then, this is not an occupational disease. *See* 33 U.S.C. §902(2). However, neither is it a traumatic injury, strictly speaking, because the agency for the aggravation of the disease involves an irritant which works in the insidious manner characteristic of occupational diseases. *See generally Grain Handling Co. v. Sweeney*, 102 F.2d 464 (2d Cir.), *cert. denied*, 308 U.S. 570 (1939). Claimant could not have been aware of the effect which inhalation of free silica was having on his diseased lungs in the same way as he would have been aware of a normal direct trauma. Therefore, because of the highly unique mechanism of the 1967 injury, the timeliness issues must be tested by the pre-1972 Amendment occupational disease standard of awareness of work-related injury. *Cf. Cooper Stevedoring of La., Inc. v. Washington*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977), *aff'g* 3 BRBS 474, BRB No. 75-237 (May 10, 1976) (pre-Amendment case). That standard is: "The limitation period for occupational diseases begins to run when the employee knows, or reasonably should know, that his condition is a disease which arose out of his employment." *Aerojet-General Shipyards, Inc. v. O'Keeffe*, 413 F.2d 793, 795 (5th Cir. 1969). *See Sun Shipbuilding and Dry Dock Co. v. McCabe*, No. 78-1389 (3d Cir., Feb. 22, 1979), *rev'g in pertinent part* 1 BRBS 509, BRB No. 74-193 (June 4, 1975); *Sun Shipbuilding and Dry Dock Co. v. Bowman*, 507 F.2d 146 (3d Cir. 1975); *Smith v. Atlantic Sandblasting Service, Inc.*, 1 BRBS 97, BRB No. 74-133 (Aug. 30, 1974), *aff'd*, No. 74-3750 (5th Cir., Feb. 6, 1976). The application of this standard depends on the facts of the

case. Under some circumstances, the claimant cannot be deemed to have been aware of this relationship until informed by an examining physician. *Compare Aerojet-General, supra,* and *Smith, supra,* with *McCabe, supra,* and *Bowman, supra.*

The administrative law judge held the 1971 claim timely because it was filed within one year of the time claimant became aware of the relationship of his disability to his work. He held that employer knew of the course of the injury in 1966, 1967, 1968 and 1971 and was not prejudiced by claimant's failure to give written notice within Section 12. We affirm the finding that Sections 12 and 13 were satisfied in this case, but we must modify certain of the findings to conform with recent developments in the case law regarding Section 12.

Claimant had been fully aware that he had a form of tuberculosis since 1966, but had no reason to suspect that the Battey bacillus causing this disease had even a remote relationship to his work until 1971. After employer had refused to rehire him in May 1971 due to his lung condition, claimant first began to suspect that there might be a connection to his work. His attorney sent two brief letters to the deputy commissioner in June 1971, but these were written at a time when there was no information linking claimant's disease to silica exposure at work. Indeed, the first letter was written explicitly to avoid the "prescription" of the Act. A formal claim filed on October 12, 1971 is explicitly based

on Veteran's Administration Hospital records which nowhere hint that claimant's tuberculosis has anything to do with his work. Claimant testified that Dr. Brown was the first to tell him of the relationship between his silica exposure and his condition. This information, according to claimant, was given to him at an unspecified time in 1971. Dr. Brown, in turn, testified that his opinion was based on the history of sandblasting exposure first mentioned by claimant to Dr. Weill in an examination on November 8, 1971. It must be remembered that claimant was at all times a welder, and could understandably have overlooked in his numerous consultations with physicians the incidental exposure to sandblasting which proved to be the only causal connection. Thus, claimant had no knowledge of the unique mechanism of the disability until sometime after November 8, 1971. His general suspicions that his work may have aggravated his condition, which suspicions were totally unsupported by medical interpretations of his work history until Dr. Brown's interpretation of Dr. Weill's history, do not indicate an "awareness" sufficient to set the limitation periods of Sections 12 and 13 running against a condition involving such complex medical casuality.

Pursuant to Section 12(a), the claimant must notify the employer of his injury within thirty days of the date he becomes aware that it is work-related, unless the employer has knowledge of the injury and is not prejudiced by the failure to give timely written notice. In light of recent case law, we are unable to agree with the

administrative law judge's apparent holding that employer's mere knowledge in 1966 and thereafter that claimant was ill is sufficient knowledge for purposes of Section 12(d). Employer must also know that the illness is or is claimed to be work-related. *See Sun Shipbuilding and Dry Dock Co. v. Walker*, 590 F.2d 73, 9 BRBS 399 (3rd Cir. 1978), *rev'g* 7 BRBS 134, BRB No. 76-438 (Dec. 15, 1977); *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978), *rev'g* 2 BRBS 272, BRB Nos. 75-102, 75-102A (Sept. 18, 1975). However, employer's knowledge at these earlier times is immaterial here. Employer received claimant's protective October 1971 claim from the deputy commissioner within a month, and was thus put on notice. To require a written notice of injury after employer had been alerted by the earlier filing of a protective claim would be to require an empty formality. The filing of the claim allowed employer to investigate the case, which is the purpose of the notice requirement. *Strachan Shipping Co., supra.* Claimant also was investigating the case at that time, and any further knowledge gained by either party would shortly be made known to the other through the deputy commissioner's informal procedures (as indeed it was in this case: the deputy commissioner informed employer of claimant's more particularized contentions by letter on March 3, 1972, after employer had failed to appear at a pre-hearing conference on January 27, 1972). With this modification, we affirm the findings that both notice and claim were timely.

Claimant argues that he is permanently totally disabled, apparently because employer would not rehire claimant in 1971 because of his health. No one disputes that claimant cannot return to welding. However, medically, claimant is barred only from moderate to moderately heavy physical exertion. The record contains ample evidence from vocational placement and rehabilitation experts that there are a number of positions available in New Orleans which claimant can perform with his disability, given his age and education.

Employer, on the other hand, argues that the administrative law judge erred in finding claimant permanently partially disabled because there is no evidence that his current reasonable earning capacity is $125 per week. It argues that in the original Decision and Order the administrative law judge found no disability, and that there was no evidence at the supplemental hearing contrary to the original evidence and determination. However, our remand requested fuller consideration of this issue than that set forth in the original Decision and Order, and the administrative law judge expressly vacated his original fact-findings and conclusions of law in this regard. This means that the holding of the Decision and Order on Remand is the administrative law judge's final holding. That holding accepted stipulations to hours and wages which reveal an average weekly wage at time of injury of $165.60, fixed a post-injury wage-earning capacity of $125, and assessed weekly permanent partial compensation of 66 2/3 percent of the difference between the two

figures. Where there are no actual post-injury wages, the administrative law judge may, under Section 8(h) of the Act, 33 U.S.C. §908(h), "fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." The administrative law judge explicitly considered these factors, as well as claimant's employability in other occupations, the possible necessity of retraining, and the possibility that employers might hesitate to hire claimant because of his physical condition, in fixing a wage-earning capacity of $125. There is also evidence, unmentioned by the administrative law judge, that claimant could expect to earn at least the minimum wage in any of the positions available to him, and in some positions much more. The wage-earning capacity fixed by the administrative law judge is reasonable in these circumstances and is in accordance with the law and the evidence. The award of $27.07 weekly compensation is affirmed.

Employer asserts that the award of an attorney's fee to claimant's counsel by the administrative law judge "must be reversed" because "[the] findings on timeliness, jurisdiction and causation must be reversed." Brief at 7. To the contrary, these findings are affirmed. Employer not having otherwise shown that this attorney's fee award is arbitrary, capricious or in abuse

of the administrative law judge's discretion, *Offshore Food Services, Inc. v. Murillo*, 1 BRBS 9, BRB No. 141-73 (May 15, 1974), *aff'd sub nom., Offshore Food Services, Inc. v. BRB*, 524 F.2d 967 (5th Cir. 1975), the award is likewise affirmed.

/s/ JULIUS MILLER
JULIUS MILLER, Member

I Concur:

/s/ ISMENE M. KALARIS
ISMENE M. KALARIS, Member

Dated this 30th day
of March, 1979.

SMITH, Chairman, concurring in part and dissenting in part:

I concur with the results reached by my colleagues on the causality and time-bar issues. As the majority states, a holding that claimant's condition is causally related to his employment necessarily leads, under both *McCabe v. Sun Shipbuilding and Dry Dock Co.*, 1 BRBS 509, 515, BRB No. 74-193 (June 4, 1975), *rev'd on other grounds*, No. 78-1389 (3d Cir., Feb. 22, 1979), and the Fifth Circuit's remand of this case, 5 BRBS 390, 541 F.2d 179 (table listing) (5th Cir. 1976), to a holding that any disability arising out of that condition is covered by the Act. With this I also agree. However, I part ways with

the majority to the extent that it holds any later exposure on land covered by the Act because an earlier exposure while working with the same employer upon navigable waters is covered.

Employer's argument that the last employer rule of *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied sub nom. Ira S. Bushey Co. v. Cardillo*, 350 U.S. 913 (1955), places coverage under Louisiana law because the last exposure was on land seems to me to be partially correct. I would hold that claimant may be awarded compensation under the Act for the full extent of his disability which existed as of his last incident of aggravating exposure upon navigable water. Any later land-based exposure gives rise to the remedies provided by local law for the extent of disability arising therefrom.

I would affirm the holding that claimant deserves compensation under the Act for the disability arising out of his 1967 exposure upon navigable water, but I again part ways with my colleagues insofar as they affirm that this disability is permanent. Claimant was disabled because working conditions allowed his atypical mycobacterial disease to assert its presence, but this debilitating activation gradually reverted to an asymptomatic somnolence upon removal of the irritating agent. While the disease is dormant, nothing related to claimant's work with employer prevents his return to work. True, he could not perform duties which would expose him to silica dust, nor apparently could

he perform work involving moderately heavy exertion. But these restrictions were to avoid activation of an underlying condition which did not arise from his employment. Lung-weakening silica exposure did not cause disability: active atypical mycobacterial disease caused disability. Once this disease was again quiescent, I see no evidence that he could not have worked in an atmosphere free of silica dust. *Cf. Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975), *aff'g* BRB No. 73-131 (Feb. 22, 1974). The law in these circumstances would only allow a temporary period of disability. Therefore, I would only affirm an award under the Act for temporary disability for the period bounded by the time claimant left work in 1967 after exposure upon navigable water and the time he returned to work entirely ashore in 1968. Any recurrence of the disease caused by this final period of employment in 1968 is compensable under Louisiana law, since the Act in 1968 did not provide shoreside coverage.

/s/ SAMUEL J. SMITH
SAMUEL J. SMITH, Chairman

APPENDIX G

Tommie L. FULKS
Petitioner-Cross
Respondent,

versus

AVONDALE SHIPYARDS, INC.,
Respondent-
Cross Petitioner,

versus

DIRECTOR, OFFICE of WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

No. 79-1861.

United States Court of Appeals,
Fifth Circuit.

Feb. 23, 1981.

Petitions for Review of an Order of the Benefits Review Board.

Before TJOFLAT, POLITZ and HATCHETT, Circuit Judges.

POLITZ, Circuit Judge:

We again consider the claim of Tommie L. Fulks for benefits under the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. §§901-950. Fulks seeks our review, as does his former employer, Avondale Shipyards, Inc. (Avondale), of the most recent decision by the Benefits Review Board (BRB). The BRB upheld an Administrative Law Judge's (ALJ) award of benefits to Fulks premised on a finding of permanent partial disability caused by the work-related aggravation of a pre-existing lung disease. We affirm.

Context Facts

Although the course of this litigation has been lengthy, the dispositive facts may be recited briefly. Fulks worked as a welder for Avondale from 1952 until 1968. In September 1966 he was hospitalized for a form of pulmonary tuberculosis called atypical mycobacteriosis, an infection of the lungs caused by an organism known as the Battey bacillus Type III. The germ, generally believed to be endemic to the soil in rural areas of the southeastern United States, is capable of lying dormant in the lungs for extended periods. Respiratory infection can occur when the lung's biological defenses attenuate, activating these organisms.

After five months of treatment Fulks returned to work but suffered a relapse in July 1967. He again re-

turned to work in March 1968 but a reactivation of the disease required termination of employment in August 1968. He has not worked since.

Fulks first suspected a causal link between his employment with Avondale and his condition as a consequence of separate conversations, during 1971, with Avondale's personnel manager and two physicians. A formal claim was filed with the deputy commissioner on October 12, 1971, and a copy was promptly transmitted to Avondale. The suspected causation was grounded on Fulks' exposure to airborne concentrations of silica particles caused by sandblasting operations.

In the first phase of the history of this litigation the ALJ held that Fulks had given Avondale timely notice and that the claim for benefits had been timely filed. Benefits were denied, however, for failure of coverage,[1] based on the ALJ's finding that there was no evidence that Fulks had been exposed to any disease-producing agents over navigable waters. In addition, the ALJ found no causal link between Fulks' condition and his exposure to silica and determined that the illness did not preclude Fulks' pursuit of meaningful employment. The BRB affirmed the finding of no coverage and

---

1 The governing coverage provision found in the pre-1972 amended version of §3(a) of the Act, 33 U.S.C. §903(a), is limited to "disability or death result[ing] from an injury occurring upon the navigable waters of the United States (including any . . . dry dock . . .)."

did not reach the other issues. On appeal, in an unpublished opinion, we reversed and remanded "for an articulation of the basis upon which rejection of coverage was sustained," noting that there was uncontroverted evidence that Fulks had worked over navigable waters during two months in 1967. *Fulks v. Avondale Shipyards, Inc.*, 541 F.2d 279 (5th Cir. 1976). 5 BRBS 390, 391.

The second phase of the history began with the BRB's determination on remand that the coverage issue was governed by *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 1 BRBS 509, 515, BRB No. 74-193 (June 4, 1975), *rev'd on other grounds*, 593 F.2d 234 (3d Cir. 1979), in which the BRB had stated:

> The amount of time spent over navigable waters during exposure to harmful stimuli causing or aggravating an occupational disease is unimportant and will not lend itself to apportionment between jurisdictions as long as the exposure over navigable waters was sufficient to have at least aggravated the condition.

The BRB in turn remanded to the ALJ for the taking of additional evidence and clarification of the ALJ's original holdings on the causal relationship between Fulks' disability and his work environment and on the nature and extent of disability. The ALJ reaffirmed his findings on the issues of timeliness of notice and claim. He rejected Fulks' claim that exposure to sandblasting was

the originating cause of his atypical mycobacterial disease. However, there was medical evidence that the inhalation of silica crystals can destroy phagocytes, cells capable of defending against infection caused by the Battey bacillus. Accordingly, the ALJ found it reasonable to infer that Fulks' exposure to sandblasting while working upon navigable waters on two occasions in 1967, after being weakened by his prior bouts with the disease, was sufficient to bring his claim within the coverage of the Act. Finally, the ALJ found that Fulks' disability was permanent and partial.

Fulks appeals (1) the determination that his disease was not brought about by pre-1966 exposure to sandblasting, and (2) that his disability is only partial. Avondale challenges the award on grounds of lack of jurisdiction and causation, untimeliness of notice and claim, and lack of substantial evidence to support the finding of permanent, albeit partial, disability.

Scope of Review

Under the statutory provisions it is the responsibility of the ALJ to make findings of fact and to determine the validity of a claim. An aggrieved party may appeal to the BRB for a review of the ALJ's decision. 33 U.S.C. §921. The BRB does not make independent findings and its review is limited: "The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. §921(b)(3).

Decisions of the BRB are subject to review by the appropriate circuit court. 33 U.S.C. §921(c). Precedent firmly establishes that the Courts of Appeals examine BRB decisions for errors of law and to make certain that the BRB has adhered to its scope of review. We likewise follow a substantial evidence standard. *See Presley v. Tinsley Maintenance Service*, 529 F.2d 433 (5th Cir. 1976). *See also Base Billeting Fund, Etc. v. Hernandez*, 588 F.2d 173 (5th Cir. 1979); *Army & Air Force Exchange Service v. Greenwood*, 585 F.2d 791 (5th Cir. 1978); *Equitable Equip. Co., Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977). The significance of the following language from *Presley*, 529 F.2d at 436, becomes readily apparent in our present review of the substantive issues:

> [T]he findings of the administrative law judge must be accepted unless unsupported by substantial evidence in the record considered as a whole. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 472, 95 L.Ed. 483, 487 (1951), or unless they are "irrational," *O'Keeffe v. Smith Associates*, 380 U.S. 359, 362, 85 S.Ct. 1012, 1014, 13 L.Ed.2d 895, 897 (1965). Moreover, if supported by the evidence and not inconsistent with the law, the administrative law judge's ,inference is conclusive. That the facts may permit diverse inferences is immaterial. The administrative law judge alone is charged with the duty of selecting the

> inference which seems most reasonable and his choice, if supported by the evidence, may not be disturbed. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947).

Before resolving the issues presented by Fulks and Avondale which invoke inquiry into the existence of substantial evidence to support the ALJ's decision, we address the initial issue of coverage under the Act.

Coverage

Avondale presses two independent yet related arguments. First, it maintains that due to the brevity of Fulks' exposure to sandblasting — two occasions in 1967 — this court should apply a *de minimis* rule. The BRB noted our earlier expression of concern for the application of such a rule in this case and refused to inject a *de minimis* standard, citing *Travelers Insurance Company v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955), which embodies the seminal expression of the "last employer" rule. The court stated, *id.* at 145:

> [T]he employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease aris-

> ing naturally out of his employment, should be liable for the full amount of the award.

The BRB's conclusion as to coverage in this case is supported by the reasoning of *Cardillo* and is consistent with the apparent and inherent coverage of the Act. The ALJ inferred that the 1967 exposure to free silica crystals contributed to the relapse because of Fulks' weakened lungs. The BRB found this inference reasonable and stated: "We hold that substantial evidence supports this finding that claimant's condition was aggravated to some degree by his water-based exposure to free silica in 1967, and consequently that his claim is covered by the Act." We agree.

Avondale next challenges the jurisdiction of this court on the ground that Fulks is covered, if at all, by the Louisiana workmen's compensation statute and not by the Longshoremen's and Harbor Workers' Compensation Act. The rationale for this contention is that Fulks' last period of exposure to sandblasting was while he was working for Avondale onshore in Louisiana rather than over navigable waters. Contrary to the position advocated by Avondale, *Cardillo* does not support such a holding. The BRB correctly noted that "[*Cardillo*] is a rule of liability assessment, not of jurisdiction." Whether over water or on land, Avondale remains the proper defendant for purposes of assessing liability. Furthermore, the principle behind the "last employer" rule enunciated in *Cardillo* is indistinguish-

able from the non-apportionment rule set forth in *McCabe, supra*, in which the BRB upheld the ALJ's finding that even if the injurious stimuli were encountered during employment both on navigable waters and in an area not covered by the Act, the entire disability was nevertheless compensable. Fulks' claim is within the reach of the Act.

Timeliness of Notice and Claim

Avondale's contentions that Fulks' claim should be barred for failure to assert it within one year of knowledge of the injury and for failure to notify Avondale of the claim are without merit. Two statutory provisions set forth the time limitations for giving notice of the illness to the deputy commissioner and the employer, and for filing a claim with the deputy commissioner. In their pre-amended form, §12 of the Act, 33 U.S.C. §912, provided that notice of an illness must be given within thirty days after the date of illness, and §13 of the Act, 33 U.S.C. §913, provided that a claim must be filed within one year after the illness. These limitations were interpreted to prescribe that the period "begins to run when the employee knows, or reasonably should know, that his condition is a disease which arose out of his employment." *Aerojet-General Shipyards, Inc. v. O'Keeffe*, 413 F.2d 793, 795 (5th Cir. 1969), *citing Travelers Insurance Company v. Cardillo, supra*. This standard was codified in the 1972 amendments to 33 U.S.C. §§912 and 913, and has been given retroactive application. *Cooper Stevedoring of La., Inc. v. Washington*, 556 F.2d 208 (5th Cir. 1977).

We are convinced by the abundance of evidence in the record that Fulks filed his application well within the one year statutory period. The ALJ was satisfied that although Fulks was fully aware from sometime in 1966 that he had a form of tuberculosis, it was not until 1971 that he had reason to suspect a causal link between this disease and the conditions at work. It was at that time that an examining physician directly confronted Fulks with the possibility of such a connection. The prior medical records from the Veteran's Administration Hospital detailing Fulks' medical background and treatment for atypical mycobacteriosis contain no reference whatsoever suggesting a causal connexity to Fulks' employment. It is reasonable to believe that if Fulks had any idea of the causal connection he would have made this known to the medical personnel then in attendance. He did not do so.

We similarly reject Avondale's contention that Fulks' claim should be barred because written notice of the injury was not given within thirty days after Fulks knew, or reasonably should have known, that his illness was work-related. 33 U.S.C. §912(a-b). The present facts fall squarely within the statutory exception to the time limitation: failure to comply with the thirty-day notice provision will be excused if the employer had knowledge of the illness and the employer has not been prejudiced by the lack of written notice. 33 U.S.C. §912(d). The exception aside, Avondale was put on notice when it received a copy of Fulks' formal claim from the deputy commissioner. This knowledge, coupled with the

lack of any evidence of prejudice to Avondale, satisfies us that both the letter and spirit of the notice provision have been satisfied.

Evidence Relative to Causation and Disability

Upon reviewing the record in light of the contentions of the parties, we conclude that the BRB did not err in affirming the award of benefits to Fulks. The evidence supporting the findings of a work-related aggravation of a pre-existing disease and consequential partial permanent disability is substantial. We note with particularity the ALJ's finding that in 1966 Fulks did not suffer from silicosis, an impairment of the lungs from exposure to silica crystals. Silicosis is generally considered to be a progressive condition. X-rays taken of Fulks over the years revealed no such progression. The absence of silicosis formed the basis for the finding that Fulks' resistance to the Battey bacillus germ was not lowered below the effective threshold in 1966, and therefore the initial onset of atypical mycobacterial disease could not be attributed to the conditions in which he worked prior to September 1966. In a not unusual situation, the ALJ was confronted with conflicting medical testimony. After weighing this evidence, the ALJ credited certain testimony and drew permissible inferences, *see Todd Shipyards Corporation v. Donovan*, 300 F.2d 741 (5th Cir. 1962), which we find both rational and supported by substantial evidence. *See*

O'Keeffe v. Smith, Hinchman & Grylla Associates, 380 U.S. 359, 362, 85 S.Ct. 1012, 1014, 13 L.Ed.2d 895 (1965).

Finally, we address the finding of permanent partial disability. Avondale apparently contends that if Fulks does not suffer from silicosis, any aggravation of a pre-existing condition can only be temporary. To the contrary, the ALJ inferred that the aggravation of Fulks' mycobacteriosis rendered him permanently susceptible to further relapses of lung infections. That Fulks could still perform certain types of work does not, without more, render this finding unreasonable. Again, the finding that upon recovering from a relapse Fulks' lungs would not return to their previous state is supported by substantial evidence. Likewise, the ALJ's finding that Fulks' disability is only partial and that Fulks is capable of employment of consequence is also supported by substantial evidence.

For these reasons we AFFIRM the decision and order of the Benefits Review Board.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1861

TOMMIE L. FULKS,
Petitioner-
Cross Respondent,

versus

AVONDALE SHIPYARDS, INC.,
Respondent-
Cross Petitioner,

versus

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Respondent.

Petition for Review of an Order of the
Benefit Review Board (Louisiana Case)

ON PETITION FOR REHEARING

(March 24, 1981)

Before TJOFLAT, POLITZ and HATCHETT, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
HENRY A. POLITZ
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
JUN 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TOMMIE L. FULKS,
Petitioner,

versus

AVONDALE SHIPYARDS, INC.,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Fulks is mistaken in his assertion that under the Longshoremen's & Harbor Workers' Compensation Act questions of fact which present diametrically opposed evidence must be resolved in the worker's favor?

STATEMENT OF PARTIES

Under Rule 21.1(b) and Rule 28.1, counsel for Avondale Shipyards, Inc. certifies that the following are parties to this proceeding:

Tommie L. Fulks, Petitioner

Avondale Shipyards, Inc., Respondent

Director, Office of Workers' Compensation Programs, U.S. Department of Labor

Ogden Corporation, parent corporation of Avondale Shipyards, Inc.

JOHN O. CHARRIER, JR.

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No. 80-1923

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

TOMMIE L. FULKS,
Petitioner,

versus

AVONDALE SHIPYARDS, INC.,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

JURISDICTION

This brief in opposition to Fulks' petition for writ of certiorari was filed within the enlarged time period granted by this Court pursuant to Rule 29.4.

STATEMENT OF THE CASE

Fulks initiated this action with the filing of Form BEC-203 on October 12, 1971. On that form, Fulks complained of having suffered injury by industrial disease and particularly having contracted an atypical tubercular condition from his employment.

Fulks has had various periods of employment with Avondale. He first worked for Avondale in 1951 for a short period of time. In 1952, he was rehired by Avondale and he continued his employment until July of 1964. He was again hired by Avondale in May of 1966.

In September of 1966, while employed by Avondale, Fulks was admitted to the Veterans Hospital, New Orleans, Louisiana, for treatment. He was not discharged from the hospital until February of 1967. Soon after his admission, he was found to be suffering from tuberculosis, which is more particularly described as atypical tuberculosis. After discharge from the hospital, Fulks returned to his employment in March of 1967 and worked for another employment period of approximately two months when he fell ill again.

During this period of illness, which lasted until March of 1968, Fulks was treated as an outpatient at the Veterans Hospital. In March of 1968, he returned to work for Avondale for another period of employment and worked regularly until August of 1968 when he fell ill again and was readmitted to the hospital. After a short stay in the hospital on this occasion, he was discharged; since that time, Fulks has not returned to work for Avondale and for a number of years has drawn Social Security benefits.

Fulks has sought compensation for his condition under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq. Avondale has maintained that the Act is not applicable to this case and even if it is, the claim is not within the statutory time requirements of the Act.

SUMMARY OF ARGUMENT

The mere fact that Fulks is a workman bringing suit under the Act does not mean questions of fact which present opposing evidence must be resolved in his favor. The presumption created by the Act in favor of workers is rebuttable by the presentation of substantial evidence. This Court has clearly established that findings of fact by an Administrative Law Judge when supported by substantial evidence are beyond the scope of judicial review. Fulks' petition for a review of the Administrative Law Judge's findings of fact is without merit.

ARGUMENT

Fulks is unequivocally wrong in his assertion that under the Longshoremen's & Harbor Workers' Compensation Act all questions of fact which are diametrically opposed, according to the evidence presented, must be resolved in his favor.

It is without any logical or sound legal basis that Fulks contends all questions of fact which present opposing evidence must be resolved in his favor based only upon his status as a workman bringing suit under the Act. The result would effectively destroy any Administrative Law Judge's finding of fact not in favor of the workman whenever there was evidence in controversy. This was simply not the intent of Congress when it established the Act, nor has it been interpreted by this Court in the manner advocated by Fulks.

The petitioner's argument is based upon a misunderstanding of the presumption created by Section 20(a) of the Act. The presumption created by the Act is not, as the petitioner asserts, conclusive in nature, but rather is rebuttable by "substantial evidence" presented by the employer. Once the employer rebuts the presumption with substantial evidence and once a finding is so made by the Administrative Law Judge, as in the instant case, the burden then shifts on appeal to the claimant to show that substantial evidence does not support the Administrative Law Judge's decision. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947).

Further, the Supreme Court of the United States has firmly established that in proceedings under the Act, the findings of fact of the Deputy Commissioner which are supported by substantial evidence are beyond the scope of permissible judicial review. In the pre-1972 amendments to the Act, this Court held that all administrative findings of the Deputy Commissioner were to be accepted unless they were not supported by substantial evidence on the record considered as a whole. *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953); *Voris v. Eikel*, 346 U.S. 328 (1953); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1950). Although there has been disagreement in the circuits after the 1972 amendments concerning acceptance of administrative findings as to questions of law, the circuits have been uniform and united in acknowledging a continued duty to accept administrative findings of fact when supported by substantial evidence. *Jacksonville Shipyards v. Perdue*, 539 F.2d 533 (5th Cir. 1976), vacated, 433 U.S. 904, adhered to on remand, 575 F.2d 79; *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976), aff'd 432 U.S. 249 (1976); *Stockman v. John T. Clark & Son, Inc.*, 539 F.2d 246 (1st Cir. 1976), cert. den. 433 U.S. 908 (1976); *Alabama Drydock & Shipbuilding Co. v. Kininess*, 554 F.2d 176 (5th Cir. 1977), cert. den., 434 U.S. 903 (1977). Clearly, Fulks' request for review of the Administrative Law Judge's findings of fact is inappropriate.

CONCLUSION

Respectfully, Fulks' petition for writ of certiorari should be denied because the Administrative Law Judge's findings of fact are supported by substantial evidence, as found by the Benefits Review Board as well as the Fifth Circuit Court of Appeals, and are thus beyond the scope of judicial review.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three copies of the above and foregoing has been sent to opposing counsel of record, by depositing same in U.S. Mail, postage prepaid, this ____ day of June, 1981.

I further certify that all parties required to be served have been served.

JOHN O. CHARRIER, JR.

Office - Supreme Court, U.S.
FILED
NOV 6 1981
ALEXANDER L. STEVAS,

Nos. 80-1923 and 80-2135

In the Supreme Court of the United States

OCTOBER TERM, 1981

TOMMIE L. FULKS, PETITIONER

v.

AVONDALE SHIPYARDS, INC., AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

AVONDALE SHIPYARDS, INC., CROSS-PETITIONER

v.

TOMMIE L. FULKS AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The petition for a writ of certiorari in No. 80-1923 presents the question:

1. Whether substantial evidence supports the administrative law judge's findings that (a) claimant's pulmonary infection was aggravated but not caused by his shipyard work and (b) his permanent disability is less than total.

The cross-petition in No. 80-2135 presents the questions:

2. Whether substantial evidence supports the ALJ's finding that the aggravation of claimant's lung condition was covered under the pre-1972 Longshoremen's and Harbor Workers' Compensation Act because it resulted from exposure to sandblasting on at least two occasions over actual navigable waters.

3. Whether the ALJ correctly concluded that claimant complied with Sections 12 and 13 of the Act, 33 U.S.C. 912 and 913, by timely filing a claim as soon as he became aware of the relationship between his disease and his employment.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1923

TOMMIE L. FULKS, PETITIONER

v.

AVONDALE SHIPYARDS, INC., AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

No. 80-2135

AVONDALE SHIPYARDS, INC., CROSS-PETITIONER

v.

TOMMIE L. FULKS AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 76a-87a)[1] is reported at 637 F.2d 1008. The opinions of the Benefits Review Board (Pet. App. 15a-19a, 25a-27a, 54a-75a) are reported at 3 B.R.B.S. 415, 5 B.R.B.S. 392.1, and 10 B.R.B.S. 340. The opinions of the administrative law judge (Pet. App. 1a-14a, 28a-50a, 51a-53a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1981, and a petition for rehearing was denied on March 24, 1981 (Pet. App. 88a-89a). The petition for a writ of certiorari was filed on May 15, 1981, and the cross-petition was filed on June 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Tommie L. Fulks worked for cross-petitioner Avondale Shipyards as a welder from 1952 until 1966 (Pet. App. 10a). In 1966, he was hospitalized and treated for a pulmonary disease (*id.* at 2a). The disease was ultimately diagnosed as atypical mycobacteriosis due to Group III Battey type bacillus (*id.* at 6a-7a). He returned to work at Avondale in March 1967 but fell ill again after a few weeks. He returned to work a second time in March 1968, but was re-hospitalized in August of that year (*id.* at 2a, 10a). Fulks attempted to return to work at Avondale upon remission of his disease in early 1971, but was refused employment because of

[1] The appendices to the petition and the cross-petition contain identical pagination.

his lung condition (*id.* at 4a). He has not worked since that date (*id.* at 2a).

Fulks filed a formal claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, on October 12, 1971, and the case was referred to an administrative law judge (ALJ) (Pet. App. 12a, 78a). Fulks contended that his original lung condition was caused by the inhalation of dust, sand, gases and fumes encountered on his job and that his relapses in 1967 and 1968 were precipitated by the same causes (*id.* at 2a). After a formal hearing, the ALJ concluded that Fulks' illness was not causally related to his employment (*id.* at 8a) and in any event was not covered under the Act because it did not occur upon navigable waters of the United States (*id.* at 5a-6a).[2] The ALJ rejected Avondale's contention that the claim was untimely under Sections 12 and 13 of the Act, 33 U.S.C. 912 and 913, which generally require written notice to the employer within 30 days and filing of the claim within one year of the injury.[3]

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[2] See former Section 3(a) of the Act, ch. 509, 44 Stat. 1426. Before 1972, the general rule was that persons injured on actual navigable waters were covered under the Act and persons injured on land were not. The 1972 amendments to the Act, however, moved the line determining federal coverage shoreward. See *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 719 (1980).

[3] The ALJ held that the limitations period did not begin to run until Fulks knew or had reason to know that his injury was job-related and that Fulks had no such knowledge until a doctor informed him of that possibility in 1971 (Pet. App. 4a). The ALJ further found that Avondale was not prejudiced by any failure to receive earlier notice because it had actual knowledge of claimant's illness and relapses and was able to call three supervisors at the hearing to testify as to the conditions of claimant's employment (*id.* at 4a-5a).

Fulks appealed the ALJ's decision to the Benefits Review Board pursuant to Section 21(b)(3) of the Act, 33 U.S.C. 921(b)(3). The Board upheld the ALJ's finding that claimant's injury was not within the coverage of the pre-1972 Act, because there was no evidence that Fulks worked upon actual navigable waters except for a few brief periods in 1967 (Pet. App. 18a-19a). The Board declined to reach the questions of whether Fulks' illness was causally related to his employment or whether he was disabled (*id.* at 18a).

Fulks filed a petition for review in the court of appeals under 33 U.S.C. 921(c). In a per curiam opinion (Pet. App. 20a-22a), the court reversed the denial of the claim, holding that it was unable to conclude that Fulks was not covered by the Act because he might have been exposed to airborne sand or iron particles while working on the water. The court remanded the case to the Board with the observation that "[t]he record before us leaves us in grave doubt that there is any support for the implicit finding of a valid *de minimis* rule of coverage in this case" (*id.* at 22a).

On remand, the Benefits Review Board held that " 'the amount of time spent over navigable waters during exposure to harmful stimuli causing or aggravating an occupational disease is unimportant and will not lend itself to apportionment between jurisdictions as long as the exposure over navigable waters was sufficient to have at least aggravated the condition' " (Pet. App. 26a, quoting *McCabe* v. *Sun Shipbuilding & Dry Dock Co.*, 1 B.R.B.S. 509 (1975), rev'd on other grounds, 593 F.2d 234 (3d Cir. 1979)). The case was then remanded to the ALJ.

At a supplemental hearing before the ALJ, Fulks and four of his former co-workers testified without contradiction to the proximity of sandblasting to

their welding work over the water and to the density of the sand in the air over the river (Pet. App. 32a-33a). The ALJ found that during the period of Fulks' reemployment in 1967 he "was exposed to sandblasting on at least two occasions while he was at work over navigable waters within 125 feet of the sandblasting operation" (*id.* at 46a). Revising his earlier finding, the ALJ found that "the evidence in the entire record as to exposure afloat in 1967 is sufficient to support coverage under the unamended Act" (*id.* at 35a).

The record was also expanded on the question of causation. Fulks' medical expert had testified in the first hearing that Fulks was suffering from silicosis (a lung disease due to inhalation of fine particles of sand), and hemosiderosis (fine particles of iron in the lung), both caused by his employment (Pet. App. 7a). Another expert testified in the second hearing that inhalation of free silica (sand) predisposes a person to the type of Battey bacillus infection from which Fulks suffered (*id.* at 37a-38a). This testimony, however, was countered by the opinions of two other medical experts who concluded that Fulks did not have silicosis or disabling hemosiderosis (*id.* at 38a-40a). These experts further concluded that Fulks' mycobacterial disease was not causally related to his job (*id.* at 8a, 38a-40a).

On the basis of this conflicting evidence, the ALJ concluded that Fulks' mycobacterial disease was not caused by his exposure to sandblasting and that he was not afflicted with silicosis or disabling hemosiderosis (Pet. App. 40a). He noted that Fulks' mycobacterial disease is not believed to be induced by inhalation of free silica and is widely believed to have its origins in the soil (*ibid.*). The ALJ found that Fulks did not have silicosis on the basis of clinical evidence showing a lack of deterioration in respira-

tory functions over a 10-year period, which is contrary to the usual progression of the disease (*id.* at 40a-41a).

Although the ALJ concluded that Fulks' lung condition did not develop because of exposure to sandblasting at work, he did find that the condition was aggravated by Fulks' job. The ALJ reasoned that after Fulks' initial bout with his mycobacterial disease "his lung tissue and/or respiratory organs were then subnormal or in weakened condition * * * [and] any destruction of defenses against bacteria might be enough to aggravate or reactivate the infection" (Pet. App. 41a-42a). He concluded that Fulks' exposure to sandblasting upon navigable waters after his return to work in 1967 was sufficient to aggravate his condition or contribute to its reactivation (*id.* at 42a). Accordingly, the ALJ determined that Fulks' relapse in 1967 was related in part to his job and the resulting disability was therefore compensable under the Act (*ibid.*).

On the question of the extent of disability, Fulks asserted that he was totally disabled, relying on the testimony of his counsel's law partner, a former industrial personnel manager, that most employers would refuse to hire Fulks because he was a poor compensation insurance risk (Pet. App. 43a). There was no factual evidence of any such refusal of employment, however, because Fulks had not tried to find another job in the nine years between his 1968 relapse and the second hearing, with the exception of a single unsuccessful attempt to be rehired by Avondale (*ibid.*). The ALJ therefore accepted the testimony of two vocational experts and Avondale's own personnel director indicating that Fulks' limitations would disqualify him from only a relatively minor part of the labor market (*id.* at 9a, 43a-44a).

The ALJ concluded that Fulks "has sustained permanent partial disability to the extent of something less than 25 percent of his [pre-injury] earnings" (Pet. App. 44a). Because Fulks had no actual post-injury earnings, the ALJ fixed his earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. 908(h), after considering various factors, including the degree of Fulks' physical impairment and the availability of jobs he was capable of performing. The ALJ determined that it was "reasonable to fix his earning capacity at $125.00 per week," and compensation was awarded based on that partial disability (Pet. App. 44a-45a).

Avondale and Fulks both appealed to the Benefits Review Board. The Board reviewed the evidence and held that "substantial evidence supports [the ALJ's] finding that claimant's condition was aggravated to some degree by his water-based exposure to free silica in 1967, and consequently that his claim is covered by the Act" (Pet. App. 64a-65a). The Board specifically rejected Avondale's argument that there was no coverage because any exposure during Fulks' last period of employment in 1968 was entirely ashore rather than on pre-1972 navigable waters (*id.* at 65a). The Board refused to apportion liability between state and federal remedies: "Exposure upon navigable waters is sufficient to bring the claim within the Act. The fact that other exposures were within the coverage of a state act does not limit the applicability of the Act to the aggravation of a condition which is thus concurrently within a state's jurisdiction" (*ibid.*). The Board noted that if it accepted Avondale's argument, "any employer could simply shift an employee to non-covered employment after years of injurious exposure, and frustrate the purposes of the Act" (*id.* at 66a).

The Board also held that the timeliness requirements of Sections 12 and 13 of the Act were met, concluding that under pre-1972 law " '[t]he limitation period for occupational diseases begins to run when the employee knows, or reasonably should know, that his condition is a disease which arose out of his employment' " (Pet. App. 67a, quoting *Aerojet-General Shipyards, Inc.* v. *O'Keeffe*, 413 F.2d 793, 795 (5th Cir. 1969)). Although Fulks had "general suspicions that his work may have aggravated his condition" after Avondale's refusal to rehire him in May 1971, he did not have the awareness necessary to commence the running of the limitations period until sometime in November of that year when his attending physician told him of the possible relationship between his silica exposure and his condition (Pet. App. 68a-69a). Thus, the Board concluded, Fulks' protective filing of a claim in October 1971 was timely. Furthermore, Avondale obtained notice of the claim within the allotted 30-day period because it "received claimant's protective October 1971 claim from the [Labor Department's] deputy commissioner within a month" (*id.* at 70a).

The Board rejected Fulks' claim that his disease developed because of work-related silicosis and was not persuaded by his contention that he is totally, rather than partially, disabled. The Board affirmed the ALJ's finding that Fulks did not have silicosis (Pet. App. 66a) and concluded that "ample evidence from vocational placement and rehabilitation experts" demonstrated that there are "a number of positions available * * * which claimant can perform with his disability" (*id.* at 71a).[4]

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[4] The Board was unanimous on the causation and timeliness issues. Board Member Smith, however, filed a partial dissent

Fulks and Avondale both sought review in the court of appeals, which affirmed the Board's order. The court held that the claim was not time-barred: "We are convinced by the abundance of evidence in the record that Fulks filed his application well within the one year statutory period" (Pet. App. 85a).[5] The court rejected Avondale's argument that Fulks could only be covered under state law because his last period of sandblasting exposure was not on a federal situs (*id.* at 83a) and affirmed, as based on substantial evidence, "the findings of a work-related aggravation of a pre-existing disease and consequential partial permanent disability" (*id.* at 86a). The court concluded that "[a]fter weighing [the conflicting medical] evidence, the ALJ credited certain testimony and drew permissible inferences * * * which we find both rational and supported by substantial evidence" (*ibid.*). Finally, the court affirmed as fully supported by the evidence the finding that the "disability is only partial and that Fulks

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as to the permanence of the disability and extent to which it was compensable under federal law. He stated (Pet. App. 75a) that he would

> only affirm an award under the Act for temporary disability for the period bounded by the time claimant left work in 1967 after exposure upon navigable water and the time he returned to work entirely ashore in 1968. Any recurrence of the disease caused by this final period of employment in 1968 is compensable under [state] law, since the Act in 1968 did not provide shoreside coverage.

[5] The court rejected Avondale's argument that it failed to receive timely notice on two grounds: (1) Avondale had knowledge of the illness and was not prejudiced by a lack of written notice, and (2) Avondale in any event received a copy of Fulks' formal claim within a month of its filing (Pet. App. 85a-86a).

is capable of employment of consequence" (*id.* at 87a).

ARGUMENT

The court of appeals correctly upheld the Benefits Review Board's decision and order. The petitions pose no significant legal issue or any issue on which there is a conflict among the circuits. Rather, they essentially present fact-bound questions that have been thoroughly reviewed by the administrative law judge, the Board and the court of appeals. Review by this Court is therefore unwarranted.

1. The scope of review of the ALJ's fact findings under the LHWCA is well-established. Administrative findings of fact must be accepted if supported by substantial evidence in the record considered as a whole. See, *e.g.*, *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-362 (1965); *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 477 (1947); 33 U.S.C. 921(b)(3); 5 U.S.C 706(2)(E). This standard applies even where " 'the facts permit the drawing of diverse inferences. The [ALJ] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable [as based on substantial evidence], may not be disturbed by a reviewing court.' " *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, *supra*, 380 U.S. at 362, quoting from *Cardillo* v. *Liberty Mutual Insurance Co.*, *supra*, 330 U.S. at 478. The Benefits Review Board and the court of appeals both properly applied this standard of review in affirming the various fact findings of the ALJ.

2. Petitioner Fulks argues (Pet. 6) that the ALJ should have found that his disease was not merely

aggravated but was actually caused by his exposure to sandblasting on the job. He further contends that the ALJ should have found him totally rather than partially disabled. Fulks does not dispute the existence of substantial evidence in the record supporting the ALJ's findings on these two points.[6] Instead, he argues that the evidence presented by the two parties was conflicting and that the ALJ was therefore required to accept his position because the Act "tilt[s] the scale in favor of the injured workman when evidence [is] diametrically opposed" and because "doubts [must] be resolved in favor of the injured workman" (*id.* at 5).

None of the cases upon which Fulks relies (Pet. 5), however, vitiates the substantial evidence rule, which leaves to the fact-finder the duty to weigh conflicting evidence and to draw the more reasonable inference. As a matter of sound compensation policy, the courts have recognized that when the record leaves a question wholly in doubt it should be re-

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[6] Petitioner Fulks' argument, therefore, cannot be based on the Act's Section 20(a) presumption (33 U.S.C. 920(a)), which is at issue in *U.S. Industries* v. *Director, OWCP*, No. 80-518 (argued Oct. 6, 1981). Section 20(a) provides that "it shall be presumed, *in the absence of substantial evidence to the contrary*—(a) that the claim comes within the provisions of this Act" (emphasis added). The employer here presented substantial evidence on the points disputed by Fulks, so the presumption is inapplicable. Cf. *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935) ("Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption [against suicide contained in Section 20(d)] falls out of the case. * * * [The presumption's] only office is to control the result where there is an entire lack of competent evidence."). The Section 20(a) presumption was not addressed below by the ALJ, Benefits Review Board, or court of appeals. Petitioner Fulks mentions it only in passing in his opposition to the cross-petition (80-2135 Br. in Opp. 3).

solved in favor of the claimant. This principle "place[s] the burden of possible error on the employer who is better able to bear it." *Bath Iron Works Corp.* v. *White*, 584 F.2d 569, 574 (1st Cir. 1978). Accord, *e.g.*, *Parsons Corp. of California* v. *Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Ryan-Walsh Stevedoring Co.* v. *Trainer*, 601 F.2d 1306, 1316 (5th Cir. 1979). But this rule has never meant that when there is conflicting evidence the testimony favoring the claimant is entitled to more weight, as a matter of law, than testimony favoring the employer; its application is properly limited to situations in which the fact-finder has no other principled basis for resolving conflicts. See *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 888 (2d Cir. 1944).

The ALJ's findings against Fulks on causation and extent of disability were based on substantial evidence. The ALJ's conclusion that Fulks' lung condition was not caused by his exposure to sandblasting is amply supported by evidence in the record that Fulks' mycobacterial infection originates from bacteria in the soil, rather than from inhalation of free silica (Pet. App. 40a). The ALJ's findings regarding silicosis are likewise based on abundant credible medical evidence, including pulmonary function tests and clinical observations over a 10-year period that failed to demonstrate the expected progression of the disease if actually present (*id.* at 40a-41a). Similarly, the finding of partial rather than total disability was based on the testimony of three experts that Fulks could perform many available jobs.[7] In short, the ALJ's factual determinations

[7] The ALJ found this evidence more credible than the testimony of the law partner of Fulks' counsel who believed that Fulks would be unable to find any employment because he was a poor compensation insurance risk. There was "no

were rational, in accordance with law and supported by substantial evidence. They were properly affirmed by both the Board and the court of appeals after examination of the record. They present no issue requiring review by this Court.

3. Avondale no longer disputes, as it did below, that Fulks' disease was permanently aggravated by his exposure to sandblasting on the job. It does contend, however, that the court of appeals and administrative tribunals erred in holding it liable for the disabling disease under the federal statute. Avondale asserts that the federal law does not apply because Fulks' silica exposure while on a covered federal situs was de minimis (Cross-Pet. 7-8) and because it was not his *last* period of exposure to sandblasting (*id.* at 8-10). Both of Avondale's coverage arguments must fail.

As to the first prong of its argument, Avondale is unable to cite any case for the proposition that a de minimis standard applies to federal coverage under the LHWCA.[8] As the Board and the court of appeals recognized (Pet. App. 63a, 83a), the issue here is merely whether there is substantial evidence

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factual evidence" to support this opinion, because Fulks had not sought jobs with any other employers (Pet. App. 43a).

[8] The two cases upon which Avondale relies for this proposition are inapposite. *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 135 F.2d 320 (5th Cir. 1943), aff'd, 321 U.S. 590 (1944) concerns the question of what constitutes compensable working time under the Fair Labor Standards Act. Avondale apparently also means to cite *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946), rather than *United States* v. *Mt. Clemens Pottery Co.*, 331 U.S. 784 (1946). The former *Mt. Clemens* decision is also an FLSA case and recognizes that a de minimis rule may apply in assessing the compensability of time spent walking between a time clock and a work bench.

to support the ALJ's finding that Fulks' exposure to sandblasting while he was at work on navigable waters aggravated his condition. There is such evidence in the record. Claimant and four of his former co-workers testified without contradiction that they were exposed to sandblasting while at work on the water (*id.* at 32a-33a). Their testimony included estimates that the sandblasting was within 50 to 200 feet of their welding operations and their recollections that the sand in the air was quite dense ("like if you were in a desert") (*id.* at 33a). The ALJ reasoned that after Fulks had contracted his disease his "lung tissue and/or respiratory organs were then subnormal or in weakened condition" and exposure to sandblasting was sufficient "to aggravate or reactivate the infection," causing his relapse (*id.* at 41a-42a). This reasonable, fact-bound inference does not warrant review by this Court.

Avondale's second argument (Cross Pet. 8-10) is that Fulks' condition is compensable only under state law because his last period of employment (in 1968) was entirely ashore, rather than on navigable water covered under the federal statute. To support this argument, Avondale relies solely on the "last employer rule" as articulated in *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955). This rule provides that, when an employee has worked for more than one employer, full liability under the Act attaches to "the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease * * *" (*ibid.*). Avondale argues, by analogy, that a "last coverage rule" should be created to allocate responsibility between state and federal jurisdiction. Again Avondale can cite no authority for this proposition. The court of

appeals, however, was clearly correct in holding (Pet. App. 83a-84a) that a last-coverage rule does not logically follow from the last-employer rule. As the Board recognized, if Avondale's position were correct, "any employer could simply shift an employee to non-covered employment after years of [covered] injurious exposure, and frustrate the purposes of the [federal] Act" (*id.* at 66a).

4. Avondale's final argument (Cross-Pet. 12-13) is that Fulks' 1971 claim and notice to the employer were out of time under Sections 12 and 13 of the Act, 33 U.S.C. 912 and 913, because he "should have reasonably known his condition was work-related at the latest by August of 1968, when he was completely unable to continue working for Avondale." [9] This argument must be rejected for two reasons. First, Avondale did not present this contention in the proceedings below. It objected to the timeliness of Fulks' notice and claim, but did not address the

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[9] Section 12(a) requires that an employer be given notice, or have knowledge, of an employment-related injury within 30 days after the injury, or after the worker "is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury * * * and the employment." 33 U.S.C. 912(a). Section 13(a) requires that a written claim for compensation be filed within one year of the same event—*i.e.*, injury or actual or constructive awareness of job-relatedness. The statutory language tolling the limitations periods until the employment-relatedness of the disabling condition becomes apparent was not added until 1972, after Fulks' claim had been filed. But the Fifth Circuit has held (*Cooper Stevedoring of Louisiana, Inc.* v. *Washington*, 556 F.2d 268, 272 (1977)) that the amended provisions are applicable to any post-1972 adjudication, a ruling Avondale does not challenge (Pet. App. 84a). In any event, the same tolling provision was applicable to occupational-disease cases by judicial construction before the amendments. See, *e.g.*, *Aerojet-General Shipyards, Inc.* v. *O'Keeffe*, 413 F.2d 793, 795 (5th Cir. 1069).

question of when Fulks knew or should have known that his illness was employment-related. Avondale simply argued that Fulks' claim was time-barred because he knew that he had a disabling disease in 1968; it totally ignored the standard requiring awareness of employment-relatedness. Second, all of the evidence in the record supports the rulings below that Fulks did not know, and could not reasonably have known, that his condition was related to his job until his physician told him of the possible medical connection in November 1971 (Pet. App. 4a, 68a-69a, 85a).[10] This amply supported and fact-bound conclusion does not merit further review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1981

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[10] Avondale points to no evidence to the contrary, but merely emphasizes that Fulks knew in 1968 that he could not continue his job as a welder with Avondale because of his health at that time. But, although Fulks knew he had to leave his job in 1968 due to ill health, it does not follow that he should have known that the conditions of his employment were *causing* the aggravation of his disease.

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